TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 313.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

THE KAW VALLEY DRAINAGE DISTRICT OF
WYANDOTTE COUNTY, KANSAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED JULY 27, 1912.

(23,309)

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1 In the Supreme Court of the State of Kansas.

No. 18064.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Plaintiff,

vs.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

Be it remembered, that on the 9th day of February, 1912, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, an Affidavit and Motion for a Writ of Mandamus, which are in words and figures as follows, to-wit:

2 In the Supreme Court of the State of Kansas.

No. 18064.

Filed Feb. 9, 1912. D. A. Valentine, Clerk Supreme Court.

THE KAW VALLEY DRAINAGE DISTRICT WYANDOTTE COUNTY, KANSAS, Plaintiff,

vs.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

Affidavit and Motion for a Writ of Mandamus.

Comes now the plaintiff and files its motion and affidavit for a writ of mandamus and alleges and shows to the Court:

That the plaintiff, The Kaw Valley Drainage District Wyandotte County, Kansas, is a public corporation duly organized and existing under and by virtue of chapter 215 of the Session Laws of the State of Kansas.

That the defendant The Kansas City Southern Railway Company, is a corporation duly organized and existing according to law.

That the Kansas River flows through the Kaw Valley Drainage District and is a navigable stream; that said stream overflowed its banks in 1903 and a large part of the city of Kansas City, Kansas, was flooded and millions of dollars worth of property lost by reason thereof.

That the federal government established harbor lines along said river, which said harbor lines coincide substantially with the lines established by the plaintiff herein for a levee along the banks of said stream.

That under and by virtue of the statutes of the State of Kansas, the plaintiff herein was given authority to determine the height of the lowest point of the superstructure of all bridges across the said Kansas river within said District, and further empowered
3 by mandamus to compel the raising of bridges in accordance therewith.

That the defendant herein owns a bridge across the Kansas River within the Drainage District which is usually termed "the Ohio bridge."

That heretofore and by virtue of the power in it vested, the plaintiff on or about the 15th of July, 1911, notified the defendant, to raise its said bridge 6.5 feet or to the required height of 340.26 feet above St. Louis Directrix and to remove the old bridge, superstructure, abutments, piers, piling and wreckage. That the said defendant has failed, neglected and refused so to do.

Wherefore plaintiff prays a writ of mandamus to the defendant requiring it to commence at once and proceed as rapidly as possible with the raising of its said bridge so that the lowest point of superstructure will be 340.26 feet above Saint Louis directrix and that it remove the old bridge, superstructure, abutments, piers, piling and wreckage; that the raising of said bridge and the removing of said obstructions is absolutely necessary in order to prevent overflow of the Kansas River by reason of the fact that at the present elevation said bridge and said obstructions obstruct the flow of water and cause the same to overflow the banks of said stream and to flood the inhabitants contiguous thereto, and for such other and further relief as to the court may seem right and proper.

KEPLINGER & TRICKETT,
Attorneys for Plaintiff.

STATE OF KANSAS,
Wyandotte County, ss:

W. H. Daniels, being duly sworn on oath, says that he is the President of the Board of Directors of The Kaw Valley Drainage District Wyandotte County, Kansas; that he has read and knows the contents of the above and foregoing affidavit and motion for a writ of mandamus and that the matters and things therein stated and set forth are true.

4 And affiant further says that this cause is filed in the Supreme Court instead of in the District Court of Wyandotte County, Kansas, for the following reasons:

That the flood season is usually in the months of June and July in each year; that the plaintiff has waited thinking that the defendant would raise its bridges without the necessity of a suit and that to file a suit in the District Court the defendant would be entitled to take an appeal and that it would be impossibble to try said cause in the District Court of Wyandotte County and secure a hearing upon an appeal within time so that said bridge could be raised before the anticipated rise in said river next June and July.

And further affiant saith not.

W. H. DANIELS.

Subscribed and sworn to before me this 8th day of February, 1912.
[SEAL.] MADELON DEROCHE,
Notary Public.

My Commission expires Jan. 11, 1916.

Endorsed: 18064. The Kaw Valley Drainage Dist. of Wyandotte

COPY BOUND

Co., Kan., Pl'ff, vs. The Kansas City Southern Ry. Co., Def't. Motion for Alternative Writ of Mandamus and Affidavit of Jurisdiction. Filed Feb. 9, 1912. D. A. Valentine, Clerk Supreme Court.

5 And also on the said 9th day of February, 1912, the same being one of the regular judicial days of the January term, 1912, of the Supreme Court of the State of Kansas, before the said court in session at the Supreme Court Room in the City of Topeka; the following proceedings among others was had, and entered of record as follows, to-wit:

6 In the Supreme Court of the State of Kansas.

FRIDAY, *February* 9, 1912.

No. 18064.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Plaintiff,

v.

THE KANSAS CITY SOUTHERN R'L'Y CO., Defendant.

No. 18065.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Plaintiff,

v.

THE KANSAS CITY TERMINAL R'L'Y CO., Defendant.

Journal Entry Allowing Petition for Alternative Writ of Mandamus.

Now comes the plaintiff herein by C. W. Trickett, its attorney, and presents its verified petition for an alternative writ of mandamus herein; and thereupon after due consideration by the court, it is ordered that the alternative writ of mandamus issue to the defendants as prayed for in such petition, returnable on Tuesday, February 20, 1912, at 9:30 o'clock A. M.

7 And also on the 17th day of February, 1912, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas a stipulation extending the time of the defendant in which to make their return and answer to the alternative writ, which is in the words and figures as follows, to-wit:

CLOSE IN CENTER

8 In the Supreme Court of the State of Kansas.

THE KAW VALLEY DRAINAGE DISTRICT WYANDOTTE COUNTY, KANSAS, Plaintiff,

vs.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

Stipulation.

It is hereby stipulated by and between the parties hereto and their attorneys, that the defendant shall have ten days from and after Tuesday, February 20, 1912, within which to make return to the alternative writ in the above entitled cause.

KEPLINGER & TRICKETT,
S. W. MOORE &
O. L. MILLER,
Att'ys for Defendant.

Endorsed: 18064. In the Supreme Court of the State of Kansas. The Kaw Valley Drainage District Wyandotte County, Kansas, Plaintiff, vs. The Kansas City Southern Railway Company, Defendant. Stipulation. Allowed this 17th day of Feb., 1912. W. A. Johnston, Chief Justice. S. W. Moore & Miller & Miller. Filed Feb. 17, 1912. D. A. Valentine, Clerk Supreme Court.

9 And afterward and on the 17th day of February, 1912, the same being one of the regular judicial days of the January term, 1912, of the Supreme Court of the State of Kansas, in session at the Supreme Court room in the City of Topeka, the following proceedings among other- was had, and remains of record as follows to-wit:

10 In the Supreme Court of the State of Kansas.

SATURDAY, *February* 17, 1912.

No. 18064.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Plaintiff,

v.

THE KANSAS CITY SOUTHERN RAILWAY CO., Defendant.

No. 18065.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Plaintiff,

v.

THE KANSAS CITY TERMINAL RAILWAY CO., Defendant.

Journal Entry of Stipulation.

On stipulation it is ordered that the defendant be allowed ten days from February 20, 1912, within which to make return to the writ of mandamus.

11 And also on the 1st day of March, 1912, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, the answer and return of the defendant to the alternative writ, which is in the words and figures as follows, to-wit:

12 In the Supreme Court of the State of Kansas.

Filed Mar. 1, 1912. D. A. Valentine, Clerk Supreme Court.

No. —.

THE KAW VALLEY DRAINAGE DISTRICT WYANDOTTE COUNTY, KANSAS, Plaintiff,

vs.

KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

Return and Answer of the Defendant to the Alternative Writ.

Now comes the above named defendant and for its return and answer to the alternative writ and petition herein, says:

That said defendant denies each and every allegation and averment in said writ and petition contained and set out not hereinafter specifically admitted.

Defendant admits that the plaintiff is a public corporation organized under Chapter 215 of the Laws of 1905 of the State of Kansas.

That the defendant is a railway corporation duly organized and existing according to law.

That the Kansas River flows through the Kaw Valley Drainage District.

That the defendant herein owns a bridge across the Kansas River within the Drainage District, which is usually termed "the Ohio Bridge."

Defendant alleges that it is a railway corporation duly organized under the laws of the State of Missouri, and is a resident and citizen of said State of Missouri and not a resident or citizen of the State of Kansas, and as such railway corporation is now and was at the commencement of this action engaged in the business of trans-

13 porting cars loaded with freight of all kinds in transit from the State of Missouri and from States other than Kansas to and into Wyandotte County and State of Kansas, and from Wyandotte County in the State of Kansas to the State of Missouri and to states other than the State of Kansas.

That the defendant's railway tracks extend from Jackson County, State of Missouri, into and through Wyandotte County and State of Kansas. That its business is that of a switching company, in the transaction of which business said defendant receives from other railroads handling shipments of goods from states other than Kansas, said railroads having no tracks connected with the industries to which said goods are consigned, and transferring cars loaded with such shipments from Kansas City in the State of Missouri to other railways in Kansas, and placing such cars to be unloaded in Kansas

at the various industries along the line of defendant's road in Kansas, and in taking cars loaded at such Kansas industries with goods to be transported to states other than Kansas and delivering such cars in Kansas City, Missouri, to various railroads for transportation to many different states, all of which business is interstate commerce and governed by various acts of the Congress of the United States and subject to the rules and regulations of the Interstate Commerce Commission of the United States.

That the defendant's railway tracks situated in the State of Missouri extend to and into Wyandotte County, Kansas, and are connected by means of tracks laid upon and across the bridge mentioned in the alternative writ herein, and usually called the Ohio Bridge, and said defendant has no connection between its railway tracks in Missouri and its railway tracks in Kansas other than those across said Ohio Bridge, and if such connection is destroyed or the use of its said tracks across said bridge is rendered unavailable, said
14 defendant's railway line will be severed and its business as an interstate carrier destroyed, and the business of large numbers of industries in Kansas served by this defendant will be greatly injured and in some cases destroyed.

Defendant further says that the purpose of the writ in this case is to require the defendant to raise the level of its said bridge and tracks across the Kansas River 6.5 feet above their present level and, if this is done, this defendant's said business will be interrupted, its trains cannot be transported across the Kansas River since it will be unable to either go on to or off said bridge with its engines or cars, and its line of road will be cut and all its interstate business effectually destroyed.

That the present height of the defendant's tracks upon said bridge is such that any additional elevation thereof will preclude the use of said bridge for trains, and the only manner in which such bridge can thereafter become available for use will be by the construction of long approaches at either end thereof elevated several feet above the present surface of defendant's tracks; but defendant says that the approaches to said bridge upon either end rest upon and extend across various public streets in Kansas City, Kansas, which streets are not under the control of this defendant but under the exclusive control of the city of Kansas City, Kansas.

That said defendant has no right, power, or authority to raise the grade of its tracks or the approaches to said railway bridge unless the grades of the streets upon which said approaches rest are by the order of said Kansas City, Kansas, raised to conform to the grades necessary to the use of said bridge for railroad purposes.

That the city of Kansas City, Kansas, has not raised the grades of any of its said streets upon which said approaches rest, and has refused to make such changes in the grades of said streets as will necessarily be required in the operation of trains by the de-
15 fendant if the height or elevation of its said railway bridge is increased in accord with the demands of the plaintiff herein, and in fact said city has failed and refused and still does refuse to make any change whatever in the grades of its said streets.

It therefore results that this defendant while at all times ready and willing to comply with any lawful or reasonable request or order of public bodies within the territories wherein it operates, ought not to be required to comply with the demand of the plaintiff as set forth in the petition and writ herein, since such compliance will destroy defendant's railway, compel it to violate its duties as a carrier of interstate commerce, abrogate its contracts with the industries which it serves, and all without due compensation being made to this defendant or any adequate protection to the business interests threatened.

That such demand of the plaintiff as set forth in the petition and writ herein, is unreasonable, illegal, arbitrary, and beyond the power of said plaintiff to make, and defendant's compliance therewith would require either a total destruction of its business as a carrier of commerce or necessitate wrongful and illegal acts of the defendant upon the public streets of Kansas City, Kansas.

Defendant further says that a compliance with the demands of the plaintiff in the reconstruction of its said bridge and the approaches thereto, if permitted, will cost this defendant a sum in excess of thirty thousand dollars, and the destruction of its bridge for railway purposes will injure and damage this defendant many hundred thousand dollars.

That the enforcement of the demands of the plaintiff will be to deprive the defendant of its property without due process of law, and to deny to it the equal protection of the laws contrary to the
16 provisions of Section 1, of Article 14, of the Amendments to the Constitution of the United States, and will operate as a direct interference with interstate commerce and a prohibition of interstate commerce, in contravention of the provisions of Section 8, of Article 1, of the Constitution of the United States.

Wherefore, defendant prays that said alternative writ be discharged and for costs.

S. W. MOORE,
S. W. SAWYER, AND
O. L. MILLER,
Attorneys for Defendant.

STATE OF KANSAS,
County of Wyandotte, ss:

O. L. Miller, being duly sworn says that he is one of the attorneys for the defendant in the above entitled action and is authorized to make this affidavit. That he has read the foregoing return and answer and knows the contents thereof, and that the statements therein made are true as he is informed and verily believes.

O. L. MILLER.

Subscribed and sworn to before me, a notary public in and for Wyandotte County and State of Kansas, this 29th day of February, 1912.

W. E. NELSON,
Notary Public.

My commission expires Sept. 30th, 1912.

Endorsed: 18064. In the Supreme Court of the State of Kansas. The Kaw Valley Drainage District Wyandotte County, Kansas, Plaintiff, vs. Kansas City Southern Railway Company, Defendant. Return and Answer of the Defendant to the Alternative Writ. S. W. Moore, S. W. Sawyer, O. L. Miller, Att'ys for Def't. Filed Mar. 1, 1912. D. A. Valentine, Clerk, Supreme Court.

17 Copy.

In the Supreme Court of the State of Kansas.

Filed Feb. 16, 1912. D. A. Valentine, Clerk Supreme Court.

THE KAW VALLEY DRAINAGE DISTRICT WYANDOTTE COUNTY, KANSAS, Plaintiff,

vs.

THE KANSAS CITY SOUTHERN RAILWAY CO., Defendant.

Writ of Mandamus.

The State of Kansas to the Defendant, The Kansas City Southern Railway Company, Greeting:

Whereas it has been made to appear to us by affidavit in words and figures as follows:

Affidavit and Motion for a Writ of Mandamus.

Comes now the Plaintiff and files its motion and affidavit for a writ of mandamus and alleges and shows to the Court:

That the Plaintiff, The Kaw Valley Drainage District Wyandotte County, Kansas, is a public corporation duly organized and existing under and by virtue of Chapter 215 of the Session Laws of 1905 of the State of Kansas.

That the defendant, The Kansas City Southern Railway Company is a corporation duly organized and existing according to law.

That the Kansas river flows through the Kaw Valley Drainage District and is a navigable stream; that said stream overflowed its banks in 1905 and a large part of the city of Kansas City, Kansas, was flooded and millions of dollars worth of property lost by reason thereof.

That the Federal Government established harbor lines along said river, which harbor lines coincide substantially with the lines established by the plaintiff herein for a levee along the banks of said stream.

That under and by virtue of the Statu-es of the State of Kansas, the plaintiff herein was given authority to determine the height of the lowest point of the superstructure of all bridges across the said Kansas river within said District, and further empowered by

18 mandamus to compel the raising of bridges in accordance therewith.

That the defendant herein owns a bridge across the Kansas River within the Drainage District which is usually termed "the Ohio Bridge."

That heretofore and by virtue of the power in it vested, the plaintiff on or about the 15th of July, 1911, notified the defendant, to raise its said bridge 6.5 feet or to the required height of 240.26 feet above St. Louis Directrix and to remove the old bridge, superstructure, abutments, piers, piling and wreckage. That the said defendant has failed, neglected and refused so to do.

Wherefore the plaintiff prays a writ of mandamus to the defendant requiring it to commence at once and proceed as rapidly as possible with the raising of its said bridge so that the lowest point of superstructure will be 340.26 feet above Saint Louis directrix and that it remove the old bridge, superstructure, abutments, piers, piling and wreckage; that the raising of said bridge and the removing of said obstructions is absolutely necessary in order to prevent overflow of the Kansas River by reason of the fact that at the present elevation said bridge and said obstructions obstruct the flow of water and cause the same to overflow the banks of said stream and to flood the inhabitants contiguous thereto, and for such other and further relief as to the court may seem right and proper.

———— ————,
Attorneys for Plaintiff.

STATE OF KANSAS,
Wyandotte County, ss:

W. H. Daniels, being duly sworn on oath says that he is the President of the Board of Directors of The Kaw Valley Drainage District, Wyandotte County, Kansas; that he has read and knows the contents of the above and foregoing affidavit and motion for a
19 writ of mandamus and that the matters and things therein stated and set forth are true.

And affiant further says that this cause is filed in the Supreme Court instead of in the District Court of Wyandotte County, Kansas, for the following reasons:

That the flood season is usually in the months of June and July in each year; that the plaintiff has waited thinking that the defendant would raise its bridge without the necessity of a suit and that to file a suit in the District Court the defendant would be entitled to take an appeal and that it would be impossible to try said cause in the District Court of Wyandotte County and secure a hearing upon an appeal within time so that said bridge could be raised before the anticipated rise in said river next June or July.

And further affiant saith not.

———— ————.

Subscribed and sworn to before me this 8th day of February, 1912.

———— ————,
Notary Public.

My commission expires Jan. 11, 1916.

2—313

Now therefore, we do command you that upon receipt of this writ that you raise and elevate your bridge known as the Ohio Avenue bridge over the Kansas River 6.5 feet or so that the lowest point of superstructure will be 340.26 feet above Saint Louis directrix, and that you commence said work at once and proceed with the same as rapidly as possible until completed or that you appear before the Supreme Court of Kansas at the State Capitol in Topeka, Kansas, on the 20th day of February, 1912, at 2 o'clock P. M. of said day and show cause by answer filed herein why you will not do so and have you then and there this writ with your return thereon showing that you have complied with or will comply with the contents hereof or the reasons why you have not or will not do so.

The hearing upon this writ and answer is hereby set for the — day of February, 1912.

20 In witness whereof, this writ is signed by the Chief Justice and the Clerk of the Supreme Court of Kansas is ordered to attest the same, with the seal of court attached this 9th day of February, 1912.

W. A. JOHNSTON,
Chief Justice.

Attest:
[SEAL.] D. A. VALENTINE,
Clerk Supreme Court.

Sheriff's Return.

STATE OF KANSAS,
County of Wyandotte, ss:

Received the within Writ of Mandamus Feb. 9, 1912, and served the same in my County on the within named Defendant, The Kansas City Southern Railway Company by delivering to Mike Kelley, personally, he being watchman for and in behalf of said Company at its office and usual place of business in Kansas City, Wyandotte County, Kansas, the original of which this is a true and certified copy, on the 13th day of Feb., 1912.

AL BECKER, *Sheriff,*
By G. W. WESTFALL, *Deputy.*

Service	$ .50
Mileage	.50
Non Est.	.....
Copy	.25
Total	$1.25

Endorsed: 18064. Kaw Valley Drainage Dist. vs. K. C. Southern Ry. Co. Writ Mandamus. Copy. Filed Feb. 16, 1912. D. A. Valentine, Clerk Supreme Court.

21 And also on the 1st day of March, 1912, there was filed in the Office of the Clerk of the Supreme Court of the State of Kansas, a stipulation to hear cause, which is in the words and figures as follows, to-wit:

22 In the Supreme Court of the State of Kansas.

THE KAW VALLEY DRAINAGE DISTRICT WYANDOTTE COUNTY, KANSAS, Plaintiff,
vs.
THE KANSAS CITY TERMINAL RAILWAY COMPANY, Defendant.

Stipulation.

It is hereby stipulated and agreed that the above entitled cause shall be set down for argument on law points April 5th, 1912, at chambers, or at such time thereafter as the court can hear the same.

KEPLINGER & TRICKETT,
Attorneys for Plaintiff.
S. W. MOORE,
S. W. SAWYER &
O. L. MILLER,
Attorneys for Defendant, Kansas City Terminal Railway Company.

Endorsed on back: No. 1806. The Kaw Valley Drainage District of Wyandotte County, Plaintiff, vs. The Kansas City Terminal Railway Co., Defendant. Stipulation. Filed March 23, 1912. D. A. Valentine, Clerk Supreme Court.

23 And afterwards and on March 23rd, 1912, the same being one of the regular Judicial days of the January Term, 1912, of the Supreme Court of the State of Kansas, in session at the Supreme Court room in the city of Topeka, the following proceedings among others, was had, and entered of record as follows, to-wit:

24 In the Supreme Court of the State of Kansas.

FRIDAY, *March* 22, 1912.

No. 18064.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Plaintiff,
v.
THE KANSAS CITY SOUTHERN R'L'Y CO., DeDfendant.

Journal Entry of Advancement.

On stipulation of counsel for both parties and for good cause shown it is ordered that the hearing of this cause be advanced upon the dockets of this court, to the 5th day of April, 1912.

25 And also on the 5th day of April, 1912, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, the reply of plaintiff to the defendant's answer and return, which *are* in the words and figures as follows, to-wit:

26 In the Supreme Court of the State of Kansas.

THE KAW VALLEY DRAINAGE DISTRICT WYANDOTTE COUNTY, KANSAS, Plaintiff,
vs.
KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

Reply.

Comes now the plaintiff and for reply to the return and answer of the defendant to the alternative writ denies each and every allegation therein contained, and specifically denies that the City of Kansas City, Kansas, has refused to make changes in the grades of streets, and alleges that the defendant has never made any request to the City of Kansas City, Kansas, for such changes.

And plaintiff further alleges that the bridge of the Kansas City Southern Railway Company is an unlawful structure and was placed in said river without any authority therefor on the part of either the War Department, the State of Kansas, the City of Kansas City, Kansas, or the Kaw Valley Drainage District.

And plaintiff further alleges that under and by virtue of an act of Congress commanding him so to do, the Secretary of War caused the Kansas River to be surveyed in the fall of the year 1909 and the fore part of the year 1910, for the purpose of establishing harbor lines and regulating and determining the height and length of bridges and on June 24th, 1910, established harbor lines and established the height and length of bridges, and promulgated said decree under and by virtue of said act and in said decree specified and named the bridge herein involved and decreed and ordered that said bridge be lengthened to the harbor lines and further ordered that it be raised to the height designated in the original writ
27 of mandamus herein specified, and that compliance with said writ of mandamus would be an actual and exact compliance with the orders of the War Department, to the fraction of an inch, and not a violation of any order of said War Department.

And plaintiff further says that under and by authority in it vested by the Legislature of the State of Kansas, it has investigated, taken evidence and determined that the height specified in the original writ herein issued was necessary for the purpose of preventing overflow and to protect lives and property of the people in said district and that the defendant herein had full knowledge thereof, said matter having been discussed with it and its engineers on numerous occasions, and plaintiff asks issuance of the writ of mandamus as originally prayed for.

KEPLINGER & TRICKETT,
Attorneys for Plaintiff.

Endorsed: 18064. Kaw Valley Drainage Dist. vs. Kansas City Southern Ry. Co. Reply. Filed Apr. 2, 1912. D. A. Valentine, Clerk Supreme Court.

28 And also on *on* the 5th day of April, 1912, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, amendments to the defendant's answer and return to the alternative writ, which are in the words and figures as follows, to-wit:

29 In the Supreme Court of the State of Kansas.

No. 18064.

KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Plaintiff,
vs.
THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

Amendments to Defendant's Return and Answer.

1. On the last page, at the end of the first paragraph of said answer and return, add the following words:

"And in violation of the Fourteenth Amendment to the Constitution of the United States."

2. After the third paragraph on page three (3), add the following:

"That there is a large amount of private property abutting upon said streets, and improvements erected thereon; that said private property and the improvements thereon, would be seriously and permanently damaged by the changing of the grade of said streets which would be made necessary by the elevation of the bridge, and the plaintiff has taken no steps to ascertain the damages to said property or to compensate the owners of said property therefor."

3. Just preceding the first paragraph on page four (4) add the following:

"That defendant's tracks on the east side of said bridge are intersected by the tracks of The Missouri Pacific Railway Company, St. Louis and San Francisco Railroad Company and Chicago Great Western Railroad Company; that if said bridge is raised, as desired by the plaintiff, and the defendant should attempt to raise its tracks to conform to said bridge so raised, the tracks of said other lines of railway intersecting defendant's tracks would be cut in two and rendered useless for service unless the tracks of said other railways should also be raised by their owners; that the plaintiff has not arranged by voluntary agreement with the owners of said other lines of railway to have said tracks raised, or taken any action whatsoever toward having them raised, and that the owners thereof refuse to raise the same."

30 4. Just before the prayer on the last page, add the following:

"Plaintiff herein has no power or authority under the statutes of the State of Kansas, or otherwise, to require the defendant's bridge, which is now build and in use, to be raised."

5. After the words "switching company" in line four (4), of paragraph two (2), on page two (2), add the following:

"In addition to its inter-state business as a common carrier of freight and passengers, and its main line of railroad crosses over said bridge and defendant carries thereon and thereover inter-state freight, both in carload and less than carload lots."

6. Put in just before the prayer the following:

"That the defendant has made application to the Chief of Engineers and Secretary of War of the United States for approval of plans for rebuilding the bridge in question and such application is now pending and by reason thereof said bridge cannot be raised without permission of said Federal Officials."

S. W. MOORE,
S. W. SAWYER,
CYRUS CRANE &
O. L. MILLER,
Att'ys for Def't.

Consent given to make the above amendments to return and Answer.

KEPLINGER & TRICKETT,
Att'ys for Pl'ff.

Endorsed: 18064. Filed Apr. 5, 1912. D. A. Valentine, Clerk Supreme Court.

31 And also on the 5th day of April, 1912, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, a motion of the plaintiff to withdraw their reply to the dedefendant's answer and return and for judgment upon the pleadings, which *are* in the words and figures, to wit:

32 In the Supreme Court of the State of Kansas.

No. 17064.

KAW VALLEY DRAINAGE DISTRICT, Plaintiff,
vs.
KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

Comes now the plaintiff and asks leave of Court to withdraw its reply, and moves for judgment upon the pleadings.

KEPLINGER & TRICKETT,
Counsel for Plaintiff.

Endorsed: 18064. Kaw Valley Drainage Bd., Plaintiff, vs. K. C. Southern Rly., Def't. Motion of Pl'ff to Withdraw Reply and for Judgment on Pleadings. Filed Apr. 5, 1912. D. A. Valentine, Clerk Supreme Court.

33 And thereafter and on the 5th day of April, 1912, the same being one of the regular Judicial days of the January Term, 1912, of the Supreme Court of the state of Kansas, in session at the

Supreme Court Room in the City of Topeka, the following proceedings among others was had, and made of record, as follows, to-wit:

34 In the Supreme Court of the State of Kansas.

FRIDAY, *April* 5, 1912.

No. 18064.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Plaintiff,

v.

THE KANSAS CITY SOUTHERN RAILWAY CO., Defendant,

No. 18065.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Plaintiff,

v.

THE KANSAS CITY TERMINAL RAILWAY CO., Defendant.

Journal Entry of Submission.

This cause comes on to be heard on the pleadings filed herein, consisting of the alternative writ of mandamus, the answer and return thereto, and the reply of the plaintiff; the defendants, The Kansas City Southern Railway Company, and the Kansas City Terminal Railway Company appearing by O. L. Miller and Cyrus Crane their attorneys, upon application, are granted leave to file forthwith amendments to their answers and returns; the plaintiff, the Kaw Valley Drainage District of Wyandotte county, appearing by C. W. Trickett, one of its attorneys, upon application is given permission to withdraw the replies filed herein and to file motions for judgment on the pleadings, and to amend the alternative writ in the case against the Kansas City Terminal Railway Company, No. 18065, as set forth in the written motion filed therein. And thereupon said causes are submitted upon the motions for judgment on the pleadings, on briefs for both parties, and after oral argument by counsel, and taken under advisement by the court.

35 And thereafter, and on May 11th, 1912, the same being one of the regular Judicial days of the January Term 1912, of the Supreme Court of the State of Kansas, in session at the Supreme Court Room in the City of Topeka, the following proceedings among others, was had, and made of record, as follows, to wit:

36 In the Supreme Court of the State of Kansas.

SATURDAY, *May* 11, 1912.

No. 18,064.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Plaintiff,

vs.

THE KANSAS CITY SOUTHERN RAILWAY CO., Defendant,

No. 18,065

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Plaintiff,

vs.

THE KANSAS CITY TERMINAL RAILWAY CO., Defendant.

Journal Entry of Decision.

This cause comes on for decision and thereupon it is ordered and adjudged that judgment herein be entered in favor of the plaintiff and against the defendant, and that the peremptory writ of mandamus issue to the defendants commanding them to forthwith remove from the channel of the Kansas river all obstructions of every kind and character where their lines cross the stream, and commanding the Kansas City Terminal Railway Company to clear such channel to a height of 342.773 feet above the Saint Louis Directrix, and commanding the Kansas City Southern Railway Company to clear such channel to a height of 340.26 above the Saint Louis Directrix. It is further ordered that the defendants pay the costs of this proceeding taxed at $——, and hereof let execution issue.

37 And also on the said 11th day of May, 1912, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas the opinion of the court in said cause, which is in the words and figures as follows, to-wit:

38 *Original Proceedings in Mandamus.*

No. 18064.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Plaintiff,

vs.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

Writs Granted.

Syllabus by the Court.

WEST, *J.*:

1. The Kaw Valley Drainage District in its work of clearing the channel of the Kansas River at and near its mouth and in prescrib-

ing the height of bridges over such stream is exercising the police power of the State, and has the right to require railroad companies to elevate their bridges to correspond with the height of levees constructed by the board, its determination that such elevation is necessary being prima facie bona fide and valid.

2. It is no defense to an action to compel such elevation that such requirement would entail upon the railroad companies large expense or force them into controversies with the city and other railroad companies respecting the raising of grades made necessary by such elevation. Their rights and franchises must be deemed to be held subject to the necessity of complying with all reasonable requirements which the legislature may make or authorize in the exercise of the police power of the state.

39 3. Such requirement does not by reason of the consequent expense and difficulty amount to a violation of the contract, commerce, due process or equal protection clause of the federal constitution.

4. The plaintiff board, having no power to abrogate its authority by contract, is not bound to refrain from requiring such elevation by reason of an agreement in 1907 to treat a certain bridge of lower elevation as lawful and sufficient; the party thus contracting with the board being required to know that such contract, if construed to prevent other and different requirements as conditions should demand them, was ultra vires.

5. The plaintiff board cannot compel the elevation of the bridges in question until reasonable plans therefor are approved by the proper federal authorities.

All the justices concurring.

A true copy.

Attest:

Clerk Supreme Court.

40 The opinion of the court was delivered by WEST, *J.*:

The Kaw Valley Drainage District prays for a writ of mandamus against the Kansas City Southern Railway Co., compelling it to raise its bridge across the Kansas river 6.5 feet, and to remove its old bridge, superstructure, abutments, piers, piling and wreckage. The plaintiff alleges that the federal government established harbor lines along the river which lines coincide substantially with those established by the plaintiff for a levee; that by statute the plaintiff is given authority to determine the height of the superstructure of all bridges crossing the river within the drainage district and to compel the raising of bridges accordingly. That the defendant owns a bridge across the river within the district, that on or about July 15, 1911, it was notified by the plaintiff to raise its bridge 6.5 feet and to remove the old bridge, superstructure, abutments, piers, piling and wreckage but that it has failed, neglected and refused so to do.

The defendant answers that it is a railway corporation, and citizen of Missouri engaged in interstate commerce, its business being

that of a switching company, moving cars received from other railroads, handling shipments of goods received from states other than Kansas, such railroads having no tracks connected with the industries to which such goods are assigned, and transferring cars loaded with such shipments from Kansas City, Missouri, to other railways in Kansas and placing such cars for unloading at the various industries along the line of defendant's road in Kansas and taking such cars there loaded and transporting them to Kansas City, Missouri; that its tracks extend from the state of Missouri to and into Wyandotte county and are laid across the bridge in question, the defendant having no other connection than its tracks across such bridge. That if such connection is detsroyed or its use rendered unavailable the line will be separated and its business as an interstate carrier destroyed and the business of a large number of industries in Kansas greatly injured and in some cases destroyed.

That if the bridge is raised as prayed for the defendant's
41 business will be interrupted, its trains can not be transported across the river and its line of road will be cut and all its interstate business effectually destroyed. That the present height of its tracks upon the bridge is such that any additional elevation will preclude the use of the bridge for trains except by the construction of another approach at either end several feet above the surface of defendant's tracks; that such approaches extend across various public streets in Kansas City, Kansas not under the control of the defendant; that the defendant has no right, power or authority to raise its tracks upon such streets unless their grade is raised by order of the city; that a large amount of private property abutting upon such streets would be seriously and permanently damaged by the change of grade and that the plaintiff has taken no steps to ascertain such damages or compensate the owners therefor; that the city refuses to change the grade. That the defendant's tracks on the east side of the bridge are intersected by the tracks of three other railroad companies and if the bridge is raised as desired such tracks would be cut in two and rendered useless unless also raised by their owners, which such owners refuse to do, and that plaintiff has made no arrangements to have the same done; that a compliance with the demand of plaintiff would cost more than $30,000, and the destruction of the bridge for railway purposes would injure the defendant many hundred thousands of dollars; that the enforcement of plaintiff's demand would deprive the defendant of its property without due process of law and deny it the equal protection of the law and operate as a direct interference with and a prohibition of interstate commerce as the defendant carries over its lines interstate freight in car load lots, and that the defendant has made application to the chief of engineers and secretary of war for approval of plans for rebuilding its bridge which application is pending and that such change can not be made without consent of such officers. Except as specifically admitted, the answer denies all allegations of the alternative writ.

The plaintiff withdrew its reply and moved for judgment
42 on the pleadings and although in the brief there is a long detailed statement of alleged facts we can only consider the case

upon the allegations contained in the writ and in the answer and return. There is no allegation in the alternative writ when the federal government established the harbor lines or when and in what manner the defendant constructed the present bridge and no direct allegation as to any old bridge, abutment, piers, piling or wreckage. All we can ascertain from the face of the pleading is that at some time the federal government established harbor lines which coincided substantially with the levee lines established by the plaintiff, that the defendant owns a bridge across the river which it has refused to raise in accordance with the notice and request of the plaintiff. The allegation in the answer that the plaintiff has no power or authority to require the bridge to be raised as demanded is possibly based upon the act of March 3, 1899, which provides (Sec. 9) that it shall not be lawful to construct any bridge over any navigable water of the United States until the consent of Congress shall have been obtained and until the plans shall have been submitted to and approved by the chief engineer and secretary of war. The allegation of the answer that application for such approval has been made and is still pending is attempted to be met by the plaintiff's brief which states that on June 24, 1910, the secretary of war ordered the defendant to do exactly what is now desired by the writ, but this allegation not being contained in the pleadings can not be considered.

Plaintiff also prays for a writ against the Kansas City Terminal Railway Co. to require it to raise its bridge, the allegations being practically identical with those already considered. To this the Terminal Company, after denying all allegations not expressly admitted, avers that it is a Missouri railway corporation engaged in interstate commerce, that its tracks extend from Jackson county, Missouri, into and through Wyandotte county, Kansas, and other allegations similar to those already made by the Southern
43 Company; further, that the demand of the plaintiff is unreasonable, illegal and arbitrary and would require either a total destruction of defendant's business or necessitate wrongful and illegal acts upon the public streets of Kansas City, Kansas. The answer further alleges that under a contract made on May 28, 1907, with the plaintiff, it was mutually agreed as a compromise and settlement of their differences then in litigation that the defendant would proceed to construct a permanent bridge in accordance with plans shown by a blue print attached to the contract, the plaintiff agreeing to such construction and declaring that when constructed it should constitute a lawful structure, not waiving any right to require the construction of an additional span from the west pier to any harbor line it had established or might thereafter establish. That pursuant to such contract the bridge was constructed at an expense of many thousands of dollars in exact accordance with such blue print and that after such contracts the defendant became owner by purchase of all the tracks heretofore belonging to the Kansas City Belt Railway Company and to the Belt Line Bridge and that no changes have occurred in the river since to warrant the demand sought by the plaintiff. That the plan for such bridge was submitted to and approved by the secretary of war and that the plans for the

bridge now demanded have not been submitted to or received the approval of the chief engineer or secretary of war as provided by the act of Congress March 3, 1899 (30 Stat. at Large, p. 1151), and that any deviation from the former bridge without such submission and approval would be unlawful.

The plaintiff added an amendment to its alternative writ and then asked for judgment on the pleadings. The amendment is that since the construction of the bridge and by virtue of a resolution of Congress February 16, 1909, the secretary of war, through the United States engineering department fixed harbor lines and decreed that the defendant's bridge should be raised. That since the erection of the present bridge the plaintiff ascertained and determined after the flood of 1908 the necessity of raising the bridge as demanded
44 and that upon order and request so to raise the same the defendant refused.

From the plaintiff's allegations concerning the bridge demanded we deduce that the war department and the plaintiff have ordered the defendant to raise its bridge to the height prayed for and that it has submitted plans to the war department for approval and that such approval has not been obtained or such application passed upon, but the allegation as to the decree of the secretary of war that the bridge be raised stands denied. To cover this gap the plaintiff produces certain blue prints or maps bearing the name of the acting secretary of war and purporting to have been prepared pursuant to a resolution of Congress of February 16, 1909, which resolution authorized the secretary of war to

"fix and establish pierhead and bulkhead lines, either or both, in the Kansas river at Kansas City, Kansas, beyond which no piers, wharves, bulkheads, or other works shall be extended or deposits made, except under such regulations as shall be prescribed from time to time by the Secretary of War."

These maps also state on their faces that they are

"To accompany report of this date (May 20, 1910) on public hearing January 25-27, 1910, authorized by the Chief of Engineers, U. S. Army."

We find in the annual report of the Chief of Engineers for 1910 (p. 1833) a report that a hearing was had in Kansas City, Missouri, January 25 with an adjourned hearing to January 27, 1910, and a report submitted May 20, 1910, with map and description of the harbor lines which lines were finally approved by the War Department June 24, 1910. In none of these maps or documents do we find any order to raise the bridge, hence this allegation remains denied and unproved.

As to the contract it seems that by its terms an agreement was made in 1907 that the present bridge should be deemed lawful and sufficient, subject to the requirement of an additional span on the west bank of the river. The allegation of the plaintiff is that the flood of 1908 made it necessary to elevate the bridge as de-
45 manded, while the allegation of the defendant is that the requirement is arbitrary and capricious. As the plaintiff is

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a public corporation manifestly created for the purpose of preserving and protecting life and property from the ravages of floods it must be presumed that its officers are acting in good faith and with sufficient cause and reason and that prima facie, at least, their conclusion as to present requirements is correct. One of the powers of the board repeatedly expressed in the act (Sec. 3006 & Sec. 3009, Gen. Stat. 1909) is to do such things as shall be "conducive to the public health, convenience or welfare," and it is known that the statute was enacted by reason of the flood disasters in 1903 and 1904 with a view to avert their repetition if possible. Among the powers vested in the board are (Sec. 3006)

"To prescribe, regulate and fix the height of the superstructures above the water, * * * to fix, regulate and change the grade or elevation of all public highways, railroads and street railroads at points where any levee may cross or intersect the same. * * * To require all railroad companies to elevate their tracks at all points where the same shall be intersected by any levee so that such tracks will not interfere with the construction or maintenance of such levee as a continuous and effective work of uniform height to prevent the overflow of any natural water course. * * * To do all other acts that may be necessary to carry out and execute the general powers hereinbefore or hereinafter granted, although not hereinbefore specially enumerated."

Being created for the purpose indicated it can not be held that one set of officers can bind themselves or their successors by an agreement like the one in question, for if such could be the case requirements for future conditions would be rendered futile, and conditions agreed upon by one board would have to remain in spite of the desires and conditions possessed and found by a subsequent board. Any person or corporation contracting with the board must be held to do so subject to such subsequent changes in the matters
46 contracted about as subsequent exigencies may require. In its work of clearing the channel of the river and fixing the height of superstructures the board is clearly exercising police power, and it is settled that in such cases a contract by which police power is attempted to be abrogated is ultra vires and void. (State v. St. Paul M. & M. Ry. Co., 108 N. W. 261.)

"The right to exercise the police power is a continuing one that cannot be limited or contracted away by the State or its municipality, nor can it be destroyed by compromise as it is immaterial upon what consideration the attempted contract is based." (Northern Pacific Railway v. Duluth, 208 U. S. 583.)

In that case it was said in the opinion, p. 596:

"There can be no question as to the attitude of this court upon this question, as it has been uniformly held that the right to exercise the police power is a continuing one; that it cannot be contracted away, and that a requirement that a company or individual comply with reasonable police regulations without compensation is the legitimate exercise of the power and not in violation of the constitutional inhibition against the impairment of the obligation of contracts."

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On the same page is found a quotation from the decision in New York & New England Railroad Company v. Bristol, 151 U. S. 556:

"It is likewise thoroughly established in this court that the inhibitions of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process, or of the equal protection of the laws, by the States, are not violated by the legitimate exercise of legislative power in securing the public safety, health and morals. The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulations in particulars essential to the preservation of the community from injury."

It is argued that because the fourth subdivision of this section authorizes the board "to condemn and cause obstructions in such water-courses to be removed" it cannot obtain the relief now
47 prayed for without condemnation and compensation. But the evident meaning of "condemn" as here used is to declare or pronounce a thing to be wrongful, and not to proceed as under the rule of eminent domain to have it appraised.

"Condemn: To pronounce to be wrong; to disapprove of; to censure." (Webster's New Int. Dic. 1911.)

The succeeding clause expressly empowers the board to acquire by "gift, purchase or condemnation" such lands as may be necessary, and it would indeed be an anomaly to speak of condemning an obstruction for the purpose of acquiring title to it.

In answer to the claim of the defendant that it is unlawful for it to change its bridge without approval by the secretary of war under the act of March 3, 1909, plaintiff cites Cummings v. Chicago, 188 U. S. 410 which held that the act of 1899 did not manifest any purpose on the part of Congress to assert power to authorize private persons to erect structures within a navigable water of the United States wholly within the limits of the state, without regard to the wishes upon the concurrent or joint assent of the state and national government. The close of the opinion is as follows:

"The secretary of war acting under the authority conferred by Congress may assent to the erection by private parties of such a structure. Without such assent the structure can not be erected by them. But under existing legislation they must, before proceeding under such an authority, obtain also the assent of the state acting by its constituted agencies."

There is nothing in this decision indicating that a bridge across such waters can be lawfully erected or reconstructed until the plans therefor are approved as required by the act of 1899. It is familiar doctrine that when Congress has legislated upon a subject within its power such legislation is binding upon the states, and for us to hold now that the defendant can be compelled by mandamus to raise its bridge as demanded without obtaining the approval of the plans therefor as required by Congress would be to disregard rather than to obey such legislation.

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48 There remain questions concerning the power or propriety of granting the writs prayed for in view of the conditions set forth by the defendant as to the raising of grade to provide proper approaches for the bridges when so raised. We are met squarely by the question whether we can or should compel the defendants to put their bridges up to an altitude, which, without the raising of approaches, would render them absolutely useless and destroy the business and interstate possibilities of the defendant companies and whether they should be required to do this upon the theory that it rests upon them to find some way to compel or induce the city and the owners of intersecting railway tracks to permit such raising of the bridges and take care of the consequent alleged damages to abutting property.

It is insisted that the only proper method of requirement, if any, would be a proceeding in equity to which the city and others interested should be made parties, and that mandamus is not available, and State v. Missouri Pacific Railway Company, 33 Kan. 176 and Burlington, etc., Railroad Company v. People, 77 Pac. 1026 are cited to sustain this contention. The first decision was upon the grounds, mainly, that the ordinance requiring the viaduct was vague and indefinite and that its enforcement would contravene certain provisions of the statute. In the Burlington case the ordinance was specific but it was deemed that a bill in equity rather than an action in mandamus was proper for the reason that the viaducts sought to be required were such that no one of the companies involved could, independently of the others, build the portion required of it. It was a case in which it was attempted to require various defendants by one order to do what would amount to works of duplication, and one in which co-operation could not be compelled. Here the two defendants only are proceeded against, each separately, and as between the plaintiff and either of them there is no physical obstacle to performing the thing required. That its performance may entail loss or expense on the defendants is a misfortune which, under the authorities, is no sufficient reason
49 for refusing the writs. In cases where public disaster is sought to be averted the exercise of the police power is often burdensome indeed to the parties moved against, and a case might be imagined in which the actual destruction of valuable property would be required. As said in Balch v. Glenn, 85 Kan. 735 (p. 740):

"Property taken or destroyed for the purpose of abating a nuisance or to prevent the spreading of a pestilence is not taken for public use. All private property is held subject to such reasonable restraints and burdens as in the opinion of the legislature will secure and maintain the general welfare and prosperity of the state."

"Cases sometimes arise where the exigencies of the situation require private property to be destroyed immediately in order to prevent the spread of pestilence or some other calamity, and where, under all the circumstances, the loss which the individual suffers is so inconsiderable in comparison with the benefits to the public that in the opinion of the legislature he is regarded as fully compensated by his individual share in the benefits accruing to the public" (p.

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743). But in this case the parties are corporations formed for a quasi public purpose and when granted rights to build their tracks across streams they take such rights subject to the liability to make such changes as the public welfare may require, especially so in cases where the occurrence or spread of great public disaster is sought to be averted.

"All property, whether owned by private persons or by corporations, is held subject to the power of the state to regulate its use in such manner as not to unnecessarily endanger the lives and the personal safety of the people. The requirements that compensation be made for private property taken for public use imposes no restriction upon the inherent power of the state by reasonable regulations to protect the lives and secure the safety of the people.

"The expenses that will be incurred by the railroad company in erecting gates, planking the crossing and maintaining flagmen * * * necessarily result from the maintenance of a public highway, under legislative sanction, and must be deemed to have been taken by the company into account when it accepted the privileges and franchises granted by the state. Such expenses must be regarded as incidental to the exercise of the police powers of the state, and must be borne by the company." (Chicago Burlington, etc., Railroad v. Chicago, 166 U. S. 226.)

"Uncompensated obedience to a regulation enacted for public safety under the police power of the state is not taking property without due compensation. * * *

"It is the duty of the railway company, at its own expense, to remove the present bridge, and also (unless it abandons or surrenders its right to cross the creek at or in that vicinity) to erect at its own expense and maintain a new bridge in conformity with the regulations established by the Drainage Commissioners, under the authority of the state; and such a requirement, if enforced, will not amount to a taking of private property for public use within the meaning of the constitution, nor to a denial of the equal protection of the laws." (C. B. & Q. Railway v. Drainage Comm'r's, 200 U. S. 561.)

In the case just cited the court quoted with approval an expression of the supreme court of Illinois that the implied authority of the company to build its present bridge was coupled with the common law duty

"to build its bridge over the natural watercourse, with a view of the future as well as the present contingencies and requirements of such watercourse, and with the further implied provision that there remained in the state, whenever the public welfare required it, the right to regulate its use" (p. 587).

In Northern Pacific Railway v. Duluth, 208 U. S. 583 it was held that an ordinance of a municipality compelling a railroad company to repair a viaduct constructed after the opening of the road, by the city in pursuance of a contract relieving the railroad from making any repairs thereon for a term of years, was not void under the contract or due process clause of the constitution, and that such repairs could be required by mandamus. The court said (p. 595):

"We cannot resist the conclusion that, so far as concerns the matter now under consideration, the charter of the relator was taken subject to the right of the State to impose this duty whenever, by reason of the establishing of new highways, it should become necessary; and hence the relator is not entitled to compensation for obedience to this requirement."

"But the exercise of the police power cannot be limited by contract for reasons of public policy, nor can it be destroyed by compromise, and it is immaterial upon what consideration the contracts rest, as it is beyond the authority of the State or the municipality to abrogate this power so necessary to the public safety" (p. 598). The Eighth Circuit Court of Appeals in Chicago B. & Q. R. Co. v. Board of Sup'r's, 182 F. 291, held that

"A railroad corporation takes its franchise authorizing it to construct and maintain its road subject to the duty of making such modifications in its roadbed, whether the same consists of trestle or grade, as may be necessary to carry the same across such public improvements as highways and public drains thereafter established."

Without multiplying citations it suffices to say that the mere matter of expense is no defense. As to the suggestion that the issuance of the writs would force the defendants into controversies with the city and with other railroad companies, it may be observed that were the defendants seeking the privilege of raising their bridges they would doubtless find a way to secure the assent of the other interested parties, and it must be left to them to take care of whatever contingencies may arise by obedience to the requirements of the writs. Such other interested parties cannot well put themselves in the attitude of the unreasonable hostility to the orders of this court or to the welfare of the people comprising the drainage district, and it can not be presumed they will do so.

While plaintiffs pray for orders directing the defendants to raise their bridges to the points designated in the alternative writs
52 and remove the old bridge, superstructure, abutments, piers, piling and wreckage, the real object is to clear the channel up to the height mentioned from obstructions—the subsequent elevation or rebuilding of the bridges in question being matters in which the defendants, rather than the plaintiff, are vitally interested.

While it is to be presumed that the bridges will, in fact, be elevated or rebuilt, it is not deemed necessary that we make an order to that effect, but the writs will be allowed in both cases requiring the defendants forthwith to remove from the channel of the Kansas River all obstructions of every kind where their lines cross such stream, the Kansas City Terminal Railway Company to clear such channel to a height of 342.73 feet above the St. Louis directrix, and the Kansas City Southern Railway Company to clear such channel to a height of 340.26 above the St. Louis directrix.

All the Justices concurring.

A true copy.

Attest:

____ ____,

Clerk Supreme Court.

53 And also on the 28th day of May, 1912, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, a petition for a rehearing, which is in the words and figures, as follows, to-wit:

54 Filed May 28, 1912. D. A. Valentine, Clerk Supreme Court.

In the Supreme Court of Kansas.

18064.

THE KAW VALLEY DRAINAGE DISTRICT WYANDOTTE COUNTY, KANSAS, Plaintiff,

vs.

KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

Motion for Rehearing on the Part of the Defendant.

Samuel W. Moore, O. L. Miller, Cyrus Crane, S. W. Sawyer, Attorneys for Defendant.

55 In the Supreme Court of Kansas.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Plaintiff,

vs.

KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

Motion for Rehearing on the Part of the Defendant.

Now on this day comes the defendant, Kansas City Southern Railway Company, and moves the court to grant this defendant a rehearing herein, for all the reasons specifically set out in the answer and return of the defendant, and in the brief filed on behalf of the defendant.

We respectfully urge the court to re-examine the law applicable to the case, and especially the authorities contained in our brief, bearing in mind the fact that there has been no hearing of testimony as to the facts involved in the case, and that all of the allegations of fact contained in the alternative writ are denied by the defendant's answer and return. Consequently, the court must take all of the allegations made in the alternative writ to be untrue and all of the statements made in the defendant's answer and return to be true.

So considered, it is difficult for us to comprehend the theory upon which the court could issue a peremptory writ of mandamus.

56 As we have undertaken to advise the Court in our answer and return, and also in our brief, the practical effect of an order such as issued in this case (unless it is made conditional upon prior action being taken by Kansas City, Kansas, and other railroad companies) is to destroy the use of the defendant's line, and prohibit it from carrying on the inter-state commerce for which it was created, and which it is expressly authorized by Act of Congress to do.

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The Act of June 15th, 1866, R. S. 5258, 14 Stat. L. 66, provides:

Every railroad company in the United States whose road is operated by steam, its successors and assigns, is hereby authorized to carry upon and over its road, boats, bridges, and ferries, all passengers, troops, government supplies, mails, freight and property, on their way from one state to another state, and to receive compensation therefor, and to connect with roads of other states, so as to form continuous lines for the transportation of the same to the place of destination.

The practical effect of the court's decision is to nullify this Act of Congress, and is, we submit, directly contrary to its express provisions.

We earnestly urge that the court, if it cannot see its way clear to refuse the writ entirely (which we think it should do), modify the decision by providing that the writ shall become permanent only after the drainage board has secured from Kansas City, Kansas, and the other railroad companies involved, the necessary permission to disturb their streets and railroad tracks, respectively.

Under the charter of Kansas City, Kansas, it is unlawful for anyone to disturb the streets without the permission of the city, and without certain steps being first taken to determine the dam-
57 ages to property, as provided in Chapter 17, Sections 1020, 1021, 1022, and 1023, General Statutes of Kansas, 1909, p. 235, 236; and section 1290, p. 305.

The effect of the court's decision is to order the defendant to do an unlawful act, on the chance that something may occur in the future, to make it lawful.

Is it not more logical that the court should order the defendant to do the act desired when it shall become lawful, and require the party desiring the defendant to do the act, to take the plain, obvious steps to make that act lawful?

We again urge the court to study carefully the case of State v. Mo. Pacific Railway Company, 33 Kansas, 176, because it is conclusive of this case. The important reason why the writ was refused in that case, was because the ordinance sought to be enforced ignored and contravened the express provisions of the Kansas statutes, in regard to street improvements. It failed to provide the steps required by the statutes before such street improvements could be erected. That is exactly the situation in this case, in view of the provisions of the charter of Kansas City, Kansas, above referred to, and we most earnestly submit that the court cannot make this order permanent (unless it makes it conditional upon the necessary steps being first taken to change the grade of the streets of Kansas City, Kansas, and to determine the damage to abutting property owners) without overruling the case of State v. Mo. Pacific Railway Company, supra.

The fairness and equity of making this modification in the order is so obvious that we cannot believe that the court will refuse to make it. There is no question about its power to make the modification, as it is well settled that the issuance of the writ is largely discretionary with the court, and will not be issued even where

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58 the plaintiff appears to have a legal right, if its issuance will work unnecessary hardship or injustice.

State ex rel. v. Marston, 6 Kansas, 524;
Evans v. Thomas, 32 Kansas, 469;

in which the court says:

Writs of mandamus are not allowed to parties in any case as a mere matter of course. They are allowed only when parties have rights to be enforced, and then only when they have no other plain and adequate remedy in the ordinary course of law; and only then when justice will be likely to be defeated or frustrated unless a writ of mandamus be allowed. Also, courts of justice may often exercise a considerable degree of discretion in allowing or refusing writs of mandamus. (State v. Marston, 6 Kas., 524, 537, and cases there cited; A. T. & S. F. Rld. Co. v. Jefferson Co., 12 Id., 136; Golden v. Elliott, 13 Id., 92; The State v. Breese, 15 Id., 125; The State v. Comm'rs of Anderson Co., 28 Id., 70.) Courts of justice may always refuse such writs where their issuance would tend to thwart the administration of justice, instead of contributing to its promotion.

Potwin Place v. Railroad, 51 Kans., 609;
Merrill on Mandamus, Sec. 64, 67;
Spelling Injunction and Ex. Remedies, Sec. 1371;
High Extraordinary Legal Remedies (3 Ed.) Sec. 9;
In Re Key, 189 U. S., 84;
Railroad v. Hall, 91 U. S., 343, 356;
People v. Olson, 74 N. E., 785 (Ill.);
State v. Cottengin, 172 Mo., 129, 134;
State v. Bridge Co., 206 Mo., 74.

SAMUEL W. MOORE,
O. L. MILLER,
CYRUS CRANE,
S. W. SAWYER,
Attorneys for Defendant.

59 And afterward and on the 14th day of June, 1912, the same being one of the regular Judicial Days of the January Term, 1912, of the Supreme Court of the State of Kansas, in session at the Supreme Court room in the city of Topeka, the following proceedings among others was had, and made of record, in words and figures as follows, to-wit:

60 In the Supreme Court of the State of Kansas.

FRIDAY, *June* 14, 1912.

18064.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Plaintiff,
v.
THE KANSAS CITY TERMINAL R'L'Y CO., Defendant.

18065.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Plaintiff,
v.
THE KANSAS CITY TERMINAL R'L'Y CO., Defendant.

Journal Entry Denying Rehearing.

Now comes on for decision the petition for a rehearing of this cause; thereupon it is ordered that said petition for a rehearing be denied.

61 And also on the 18th day of June, 1912, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, a petition for a writ of error, in the words and figures as follows, to-wit:

62 Filed Jun- 18, 1912. D. A. Valentine, Clerk Supreme Court.

UNITED STATES OF AMERICA,
State of Kansas, ss:

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Defendant in Error.

Petition for Writ of Error.

To the Honorable Chief Justice of the Supreme Court of the State of Kansas:

The petition of The Kansas City Southern Railway Company respectfully shows: That on the 11th day of May, A. D. 1912, the Supreme Court of the State of Kansas made and entered a final order and judgment herein against your petitioner, The Kansas City Southern Railway Company in a cause wherein the Kaw Valley Drainage District of Wyandotte County, Kansas, was plaintiff and The Kansas City Southern Railway was defendant, in which

final order and judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of your petitioner in that it deprived your petitioner of rights, titles, privileges and immunities guaranteed it by the Constitution of the United States, because it upholds the validity of a statute of the State of Kansas (Article 3, Chapter 34, General Statutes of Kansas, 1909, p. 661,) and authority exercised thereunder by the Kaw Valley Drainage District of Wyandotte County, Kansas, which is repugnant to Section 1 of the Fourteenth Amendment, Section 8, Article 1, and Section 10, Article 1, of the Constitution of the United States, and to the Act of Congress of the United States of March 3, 1899, (Chapter 425, Section 9; 30 Statutes at Large of U. S.,
63 p. 1151), and to the Act of Congress of the United States of June 15th, 1866 (R. S. Sec. 5258, 14 Stat. L. 66), all of which will more in detail appear from the assignments of error which are filed with this petition.

That the said supreme court of the state of Kansas is the highest court of the said state of Kansas in which a decision in this suit and this matter could be had.

That a reference to the record had in the trial and proceedings in said cause will show that your petitioner has properly preserved and raised those constitutional and statutory rights upon which it relies.

Wherefore your petitioner prays that a writ of error from the Supreme Court of the United States may issue in this behalf to the Supreme Court of the State of Kansas for the correction of errors so complained of and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States, and your petitioner further prays for citation and supersedeas.

Dated this 18th day of June, A. D. 1912.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
By S. W. MOORE,
O. L. MILLER &
CYRUS CRANE, *Its Attorneys.*

Let the Writ of Error issue as prayed June —, 1912.

———,
Chief Justice of the Supreme Court of the State of Kansas.

64 [Endorsed:] 18064. Kan. City Southern Ry. Co. vs. Kaw Valley Drainage District of Wyandotte Co., Kan. Petition for Writ of Error. Filed Jun- 18, 1912. D. A. Valentine, Clerk Supreme Court.

65 And also on the 18th day of June, 1912, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, the assignments of errors, which are in the words and figures as follows, to-wit:

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66 In the Supreme Court of the State of Kansas.

No. —.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Plaintiff in Error,

vs.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Defendant in Error.

Assignments of Error.

Now comes the said plaintiff in error and respectfully submits that in the record, proceedings, decision, and final judgment of the Supreme Court of the State of Kansas, in the above entitled matter there is manifest error in this, to-wit:

1. The court erred in holding that the provisions of Article 3, Chapter 34, of the General Statutes of the State of Kansas for the year 1909, and the authority exercised thereunder and thereby authorized to be exercised thereunder, are in conflict with and in violation of the provisions of section 1 of the Fourteenth Amendment of the Constitution of the United States, for that the State of Kansas, by and through the provisions of the said act and the authority exercised thereunder assumes and seeks (1) to deprive the plaintiff in error and certain other citizens of the United States of rights, privileges and immunities secured to other citizens of the United States and of the said state; (2) to deprive the plaintiff in error and other citizens of the United States of liberty and property without due process of law; (3) to deprive and deny to the plaintiff in error and certain citizens and persons within the jurisdiction of the State of Kansas the equal protection of the laws.

67 2. The court erred in holding that by the provisions of the said act and the authority exercised thereunder, and thereby authorized to be exercised thereunder, the plaintiff in error is not deprived of rights, privileges and immunities, secured to citizens of the United States by the Constitution of the United States and the laws of the United States.

3. The court erred in holding that by the provisions of the said act and the authority exercised thereunder and thereby authorized to be exercised thereunder, the plaintiff in error is not deprived of liberty and property without due process of law.

4. The court erred in holding that by the provisions of the said act and the authority exercised thereunder and thereby authorized to be exercised thereunder, the plaintiff in error is not denied the equal protection of the law.

5. The court erred in holding that the said act and the authority exercised thereunder and thereby authorized to be exercised thereunder, is within the police powers of the Legislature of the State of Kansas.

6. The court erred in holding that the provisions of the said act and the authority exercised thereunder and thereby authorized to be

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exercised thereunder, are not in violation of section 8, Article 1, of the Constitution of the United States which confers upon the Congress of the United States the exclusive power to regulate commerce, among the several states.

7. The court erred in that, while it appeared that the authority sought to be exercised under the said act in this case was repugnant to the act of Congress of the United States of March 3, 1889, (Chap. 425, sec. 9; 30 Statutes at Large, page 115) yet the court in its decision orders indirectly that which it admits it could not order directly except in violation of the said act of Congress.

68 8. The court erred in holding that the said act and the authority exercised thereunder and thereby authorized to be exercised, is not in violation of the act of Congress of the United States of June 15, 1866 (R. S. 5258, 14 Statutes at Large 66), in that it deprives the plaintiff in error of the use of its line of railway and denies to it the right and privilege of carrying on interstate commerce as it is expressly authorized by said act so to do.

9. The court erred in holding that the action alleged to have been taken by the defendant in error in regard to plaintiff in error's bridge, without any hearing or opportunity on the part of the plaintiff in error to be heard, did not deprive the plaintiff in error of its property without due process of law in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States.

10. The decision of the court in ordering the plaintiff in error to do certain acts without the plaintiff in error having been given any opportunity to present a defense or to be heard upon the facts, is in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States in that it deprives the plaintiff in error of its property without due process of law.

11. The plaintiff in error is deprived of its property without due process of law in that it has never been given a hearing or had an opportunity to present evidence either before the defendant in error or before any court or other tribunal as to the cost or necessity of raising its bridge or doing any of the other acts desired and prayed for by the defendant in error or ordered by the court, and in holding that the plaintiff in error could be required to raise or remove its bridge or perform the other acts ordered by the court, the Supreme Court of Kansas denied the plaintiff in error the rights, privileges and immunities guaranteed to it by section 1 of the Four-

69 teenth Amendment to the Constitution of the United States.

12. The action of the Supreme Court of Kansas in this case is repugnant to the act of Congress of the United States of March 3, 1899 (chap. 425, sec. 9; 30 Statutes at Large, 1151), in that no plans for the changing or raising of the plaintiff in error's bridge, as ordered by the Supreme Court of Kansas, have been approved by the Chief of Engineers or the Secretary of War, either upon the application of the defendant in error or any one else.

13. The decision of the court is repugnant to the act of Congress of the United States of June 15, 1866 (R. S. sec. 5258, 14 Statutes at Large 66), and denies to plaintiff in error the rights, privileges and immunities secured to it by said act in that the plaintiff in error is deprived of its right to carry upon and over its road and bridge

all passengers, troops, government supplies, mails, freight and property on their way from one state to another state and to receive compensation therefor, and to connect with roads of other states so as to form continuous lines for the transportation of same to the places of destination.

14. The alleged action of the defendant in error in regard to plaintiff in error's bridge is repugnant to the act of Congress of the United States of June 15, 1866 (R. S. sec. 5258, 14 Statutes at Large 66), in that the plaintiff in error is deprived of its right to carry upon and over its road and bridge all passengers, troops, government supplies, mails, freight and property on their way from one state to another state and to receive compensation therefor, and to connect with roads of other states so as to form continuous lines for the transportaion of same to the places of destination, and the court erred and denied to the plaintiff in error the rights, privileges and immunities guaranteed to it by said act in refusing to so hold.

70 15. The court erred in holding that the alleged action of the defendant in error in regard to plaintiff in error's bridge is not in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States in that it deprives the plaintiff in error of its property without due process of law, and in that it deprives the plaintiff in error of the equal protection of the laws.

16. The court erred in holding that the alleged action of the defendant in error in regard to plaintiff in error's bridge is not repugnant to the act of Congress of the United States of March 3, 1899 (chap. 425, sec. 9; 30 Statutes at Large 1151), in that no plans for the raising or changing of the plaintiff in error's bridge as ordered by the Supreme Court of Kansas have been approved by the Chief of Engineers or the Secretary of War, either upon the application of the defendant in error or any one else.

17. The court erred in holding that the alleged action of the defendant in error in regard to the plaintiff in error's bridge is not rejugnant to the act of Congress of the United States of June 15, 1866 (R. S. 5258, 14 Statutes at Large 66), in that it deprives the plaintiff in error of its right to carry on its business of interstate commerce transportation as authorized by said act.

18. The court erred in holding that the alleged action of the defendant in error in regard to plaintiff in error's bridge does not deprive the plaintiff in error of its property without due process of law, and of the equal protection of the laws in that it seeks to compel the plaintiff in error to commit a nuisance and unlawful acts upon the streets of Kansas City, Kansas, and to commit other unlawful acts by interfering with the property of other persons and corporations.

19. The decision of the court is in violation of the Fourteenth Amendment to the Constitution of the United States in that
71 it orders and seeks to compel the plaintiff in error to commit a nuisance and unlawful acts in the streets of Kansas City, Kansas, and to commit other unlawful acts by interfering with the property of other persons and corporations.

20. The decision of the court denies to the plaintiff in error the rights, privileges and immunities secured to it by the Constitution

of the United States, and particularly in section 1 of the Fourteenth Amendment to the Constitution of the United States in that it deprives the plaintiff in error of its property without due process of law, and also deprives it of the equal protection of the laws, in these respects, to-wit:

(*a*) Defendant in error's pleading, filed in the Supreme Court of the State of Kansas, raised questions of fact which were denied by plaintiff in error in proper form and as required by law. The decision of the Supreme Court of the State of Kansas proceeded to render final judgment without any proper determination of the issues of fact so raised, either by hearing before itself or by reference of such questions to a Master or otherwise, contrary to the course of pactice and rights accorded to all other litigants.

(*b*) The decision of the Supreme Court of Kansas grants to defendant in error relief and orders totally outside of the relief prayed for by the defendant in error, and grants such relief also on the determination of questions of fact as to which no hearing whatever had been had, either in said court or before a Master, contrary to the uniform course of practice and to the rights accorded to all other litigants.

(*c*) The Supreme Court of Kansas granted final relief to the defendant in error by assuming that allegations of fact made by the defendant in error were true, although denied by the plaintiff in error, and by assuming as true, facts not even alleged by the defendant in error, but facts which were entirely outside of the
72 record in the case, contrary to the uniform practice and custom and to the rights accorded to all other litigants.

(*d*) The Supreme Court of Kansas by its decision and judgment granted relief which amounts to the destruction and confiscation of the property of plaintiff in error, on disputed issues of fact, without a hearing, and without compliance with the forms of law, or the procedure required by the Constitution and Statutes of the State of Kansas in every kind and character of litigation.

(*e*) The decision of the Supreme Court of Kansas while ostensibly upon the pleadings, in fact determined the issues upon the facts without any opportunity whatever being given to the plaintiff in error to present evidence upon those facts and without any hearing of evidence of any kind or character whatsoever, contrary to the uniform custom and requirements of the State of Kansas, and contrary to the rights accorded other litigants.

Wherefore plaintiff in error prays that the final decision of the Supreme Court of Kansas in this cause be reversed by the Supreme Court of the United States.

S. W. MOORE,
O. L. MILLER,
CYRUS CRANE,
Attorneys for Plaintiff in Error.

73 [Endorsed:] 18064. Kan. City Southern Ry. Co. v. The Kaw Valley Drainage District of Wyandotte Co., Kansas. Assignment of Errors. Filed Jun- 18, 1912. D. A. Valentine, Clerk Supreme Court.

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74 And afterward and on the 25th day of June, 1912, the same being one of the regular judicial days of the January Term, 1912, of the Supreme Court of the State of Kansas, in session at the Supreme Court room in the City of Topeka, the following proceedings among others was had, and made of record, as follows, to-wit:

75 In the Supreme Court of the State of Kansas.

18064.

THE KAW VALLEY DRAINAGE DISTRICT, WYANDOTTE COUNTY, KANSAS, Defendant,

vs.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

And now on this 25th day of June, 1912, comes O. L. Miller and S. W. Sawyer, attorneys for the above named defendant and presents to the Honorable W. A. Johnston, Chief Justice of the Supreme Court of the State of Kansas, their petition for the allowance of a writ of error herein for the purpose of perfecting an appeal to the United States Supreme Court; and also comes L. W. Keplinger, attorney for the plaintiff and opposes the allowance of said petition. And thereupon, and after due consideration it is ordered, that the application for a writ of error be denied, for the reason that no federal question is involved. And thereupon the attorneys for the defendant except to the ruling denying said application, and said exception is allowed.

W. A. JOHNSTON,
Chief Justice, Supreme Court of the State of Kansas.

76 In the Supreme Court of the State of Kansas.

STATE OF KANSAS,
Supreme Court, ss:

I, D. A. Valentine, Clerk of the Supreme Court of the State of Kansas, do hereby certify that the above and foregoing is a full, correct and complete transcript of the pleadings and papers filed, and of all proceedings had, in said court in above entitled cause, as the same remain on file and of record in my office.

Witness my hand, and the seal of the Supreme Court of the State of Kansas affixed hereto, at my office in the City of Topeka this 27th day of June, 1912.

[Seal Supreme Court, State of Kansas].

D. A. VALENTINE,
Clerk Supreme Court.

77 Here follows the Original Petition for a Writ of Error, the Assignments of Errors and Prayer for Reversal, the Writ of Error, the Citation and proof of service thereof, and a copy of the Bond.

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78 *Petition for Writ of Error.*

To the Honorable Willis Van DeVanter, Associate Justice of the Supreme Court of the United States:

The petition of The Kansas City Southern Railway Company, a corporation of the State of Missouri, respectfully shows:

That heretofore, on the 9th day of February, 1912, there was instituted in the Supreme Court of the State of Kansas, by The Kaw Valley Drainage District of Wyandotte County, Kansas, a public corporation, organized under the laws of the State of Kansas, an original proceeding in mandamus, by which the said Kaw Valley Drainage District of Wyandotte County, Kansas, prayed a writ to compel your petitioner to raise a certain bridge across the Kansas, or Kaw, River, which it was alleged that your petitioner owns, six and five tenths (6.5) feet above its present height.

The petition of the plaintiff and the alternative writ alleged that the plaintiff, under the authority of the laws of the State of Kansas, did order direct that said bridge be so raised.

Thereafter, your petitioner filed its return to the alternative writ, which was issued by the Supreme Court of the State of Kansas, denying all of the allegations in the plaintiff's petition, and in the alternative writ, except the fact that the plaintiff was a public corporation; that the defendant was a railway corporation; that the Kansas River flows through the Kaw Valley Drainage District, and that your petitioner owns a bridge across said River.

In said return your petitioner also showed that the order and direction of the plaintiff, if enforced, was repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States; to Section 8 of Article I of the Constitution of the United States; and to Section 10 of Article I of the Constitution of the United States; and to the Act of Congress of the United States, of June 15th, 1886 (R. S. 5258; 14 Stat. L. 66); to the Act of Congress of the United States of March 3, 1899 (Chapter 425,
79 Section 9; 30 Stat. L. 1151) and that it would deprive your petitioner of rights, privileges and immunities under such provisions of the Constitution of the United States and under the Statutes and laws of the United States, and particularly under said Statutes of the United States above referred to; all of which will more particularly appear in the record and proceedings in said Supreme Court of the State of Kansas, and in the Assignment of Errors filed herewith.

That thereafter, on or about the 11th day of May, A. D. 1912, the Supreme Court of the State of Kansas made and entered a final judgment and order in said cause against your petitioner, requiring, ordering and directing that your petitioner remove its bridge from said River, together with all abutments and piers belonging thereto. In effect the Court held that it could not, without violating the said Act of Congress of March 3rd, 1899, order the plaintiff in error's bridge to be reconstructed and raised as prayed by the defendant in error, but attempted to avoid the effect of said Act of Congress by ordering and directing that the plaintiff in error do what was not prayed by the defendant in error, nor set out in the alternative

writ in said cause—that is, to remove and entirely destroy the plaintiff in error's bridge, with all its piers and abutments. The effect of this decision is not only directly contrary to said act of Congress of March 3rd, 1899, but also would result in the utter destruction of the plaintiff in error's line of railway, and would deprive it of its property without due process of law, and disable it from carrying on its business of interstate transporation, as it is authorized to do by the Act of Congress of June 15th, 1886. That the effect of said decision is an attempt on the part of the State of Kansas to declare a structure made lawful by the laws of the United States to be unlawful, without any concurrent action by Congress or the properly constituted authorities of the United States.

That in said final order and judgment, and the proceedings had thereunto in said cause, certain errors were committed, to the prejudice of your petitioner, in that your petitioner was deprived
80 of certain rights, titles, priveleges and immunities guaranteed to it under the Constitution and laws of the United States, and in that an authority exercised under the State of Kansas, which was and is repugnent to the Constitution and laws of the United States, was enforced and held valid by said Supreme Court of the State of Kansas; all of which will more in detail appear from the Assignment of Errors which is filed with this petition.

That the said Supreme Court of the State of Kansas is the highest Court in said State of Kansas in which a decision in this suit and this matter could be had.

That a reference to the record had in the trial and proceedings of said cause, will show that your petitioner has properly preserved and raised those federal questions and rights upon which it relies.

Wherefore, your petitioner prays that a writ of error from the Supreme Court of the United States may issue in this behalf to the Supreme Court of the State of Kansas, for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States, and your petitioner further prays for a citation and supersedeas.

Dated this 1st day of July, 1912.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
By SAMUEL W. MOORE,
CYRUS CRANE,
O. L. MILLER,
ALDIS B. BROWNE,
Its Attorneys and Counsel.

Let the writ of error issue as prayed this July 5th, 1912.

WILLIS VAN DEVANTER,
Associate Justice of the Supreme Court of the United States

81 The Supreme Court of the United States.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Plaintiff in Error,

vs.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Defendant in Error.

Assignments of Error.

Now comes the said plaintiff in error and respectfully submits that in the record, proceedings, decision, and final judgment of the Supreme Court of the State of Kansas, in the above entitled matter there is manifest error in this, to-wit:

1. The court erred in holding that the provisions of Article 3, Chapter 34, of the General Statutes of the State of Kansas for the year 1909, and the authority exercised thereunder and thereby authorized to be exercised thereunder, are not in conflict with and in violation of the provisions of Section 1 of the Fourteenth Amendment of the Constitution of the United States, for that the State of Kansas, by and through the provisions of said act and the authority exercised thereunder assumes and seeks (1) to deprive the plaintiff in error and certain other citizens of the United States of rights, privileges and immunities secured to other citizens of the United States and of the said state; (2) to deprive the plaintiff in error and other citizens of the United States of liberty and property without due process of law; (3) to deprive and deny to the plaintiff in error and certain citizens and persons within the jurisdiction of the State of Kansas the equal protection of the laws.

82 2. The court erred in holding that by the provisions of the said act and the authority exercised thereunder, and thereby authorized to be exercised thereunder, the plaintiff in error is not deprived of rights, privileges and immunities, secured to citizens of the United States by the Constitution of the United States and the laws of the United States.

3. The court erred in holding that by the provisions of the said act and the authority exercised thereunder and thereby authorized to be exercised thereunder, the plaintiff in error is not deprived of liberty and property without due process of law.

4. The court erred in holding that by the provisions of the said act and the authority exercised thereunder and thereby authorized to be exercised thereunder, the plaintiff in error is not denied the equal protection of the law.

5. The court erred in holding that the said act and the authority exercised thereunder and thereby authorized to be exercised thereunder, is within the police powers of the Legislature of the State of Kansas.

6. The court erred in holding that the provisions of the said act and the authority exercised thereunder and thereby authorized to be exercised thereunder, are not in violation of section 8, article 1, of the Constitution of the United States which confers upon the Congress of the United States the exclusive power to regulate commerce among the several states.

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7. The court erred in that, while it appeared that the authority sought to be exercised under the said act in this case was repugnant to the act of Congress of the United States of March 3, 1899 (Chap. 425, sec. 9; 30 Statutes at Large, page 115), yet the court in its decision orders indirectly that which it admits it could not order
83 directly except in violation of the said act of Congress.

8. The court erred in holding that the said act and the authority exercised thereunder and thereby authorized to be exercised, is not in violation of the act of Congress of the United States of June 15, 1866 (R. S. 5258, 14 Statutes at Large 66), in that it deprives the plaintiff in error of the use of its line of railway and denies to it the right and privilege of carrying on interstate commerce as it is expressly authorized by said act so to do.

9. The court erred in holding that the action alleged to have been taken by the defendant in error in regard to plaintiff in error's bridge, without any hearing or opportunity on the part of the plaintiff in error to be heard, did not deprive the plaintiff in error of its property without due process of law in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States.

10. The decision of the court in ordering the plaintiff in error to do certain acts without the plaintiff in error having been given any opportunity to present a defense or to be heard upon the facts, is in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States in that it deprives the plaintiff in error of its property without due process of law.

11. The plaintiff in error is deprived of its property without due process of law in that it has never been given a hearing or had an opportunity to present evidence either before the defendant in error or before any court or other tribunal as to the cost or necessity of raising its bridge or doing any of the other acts desired and prayed for by the defendant in error or ordered by the court, and in holding that the plaintiff in error could be required to raise or remove its bridge or perform the other acts ordered by the court, the
84 Supreme Court of Kansas denied the plaintiff in error the rights, privileges and immunities guaranteed to it by section 1 of the Fourteenth Amendment to the Constitution of the United States.

12. The action of the Supreme Court of Kansas in this case is repugnant to the act of Congress of the United States of March 3, 1899 (chap. 425, sec. 9; 30 Statutes at Large, 1151), in that no plans for the changing or raising of the plaintiff in error's bridge, as ordered by the Supreme Court of Kansas, have been approved by the Chief of Engineers or the Secretary of War, either upon the application of the defendant in error or any one else.

13. The decision of the court is repugnant to the act of Congress of the United States of June 15, 1866 (R. S. sec. 5258, 14 Statutes at Large 66), and denies to plaintiff in error the rights, privileges and immunities secured to it by said act in that the plaintiff in error is deprived of its right to carry upon and over its road and bridge all passengers, troops, government supplies, mails, freight and property on their way from one state to another state and to receive compensation therefor, and to connect with roads of other states so as

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to form continuous lines for the transportation of same to the places of destination.

14. The alleged action of the defendant in error in regard to plaintiff in error's bridge is repugnant to the act of Congress of the United States of June 15, 1866 (R. S. sec. 5258, 14 Statutes at Large 66), in that the plaintiff in error is deprived of its right to carry upon and over its road and bridge all passengers, troops, government supplies, mails, freight and property on their way from one state to another state and to receive compensation therefor, and to connect with roads of other states so as to form continuous lines for the transportation of same to the places of destination, and
85 the court erred and denied to the plaintiff in error the rights, privileges and immunities guaranteed to it by said act in refusing to so hold.

15. The court erred in holding that the alleged action of the defendant in error in regard to plaintiff in error's bridge is not in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States in that it deprives the plaintiff in error of its property without due process of law, and in that it deprives the plaintiff in error of the equal protection of the laws.

16. The court erred in holding that the alleged action of the defendant in error in regard to plaintiff in error's bridge is not repugnant to the act of Congress of the United States of March 3, 1899 (chap. 425, sec. 9; 30 Statutes at Large 1151), in that no plans for the raising or changing of the plaintiff in error's bridge as ordered by the Supreme Court of Kansas have been approved by the Chief of Engineers or the Secretary of War, either upon the application of the defendant in error or any one else.

17. The court erred in holding that the alleged action of the defendant in error in regard to the plaintiff in error's bridge is not repugnant to the act of Congress of the United States of June 15, 1866 (R. S. 5258, 14 Statutes at Large 66), in that it deprives the plaintiff in error of its right to carry on its business of interstate commerce transportation as authorized by said act.

18. The court erred in holding that the alleged action of the defendant in error in regard to plaintiff in error's bridge does not deprives the plaintiff in error of its property without due process of law, and of the equal protection of the laws in that it seeks to compel the plaintiff in error to commit a nuisance and unlawful acts upon the streets of Kansas City, Kansas, and to commit other unlawful acts by interfering with the property of other persons and corporations.

86 19. The decision of the court is in violation of the Fourteenth Amendment to the Constitution of the United States in that it orders and seeks to compel the plaintiff in error to commit a nuisance and unlawful acts in the streets of Kansas City, Kansas, and to commit other unlawful acts by interfering with the property of other persons and corporations.

20. The decision of the court denies to the plaintiff in error the rights, privileges and immunities secured to it by the Constitution of the United States, and particularly in Section 1 of the Fourteenth Amendment to the Constitution of the United States in that it de-

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prives the plaintiff in error of its property without due process of law, and also deprives it of the equal protection of the laws, in these respects, to-wit:

(*a*) Defendant in error's pleading, filed in the Supreme Court of the State of Kansas, raised questions of fact which were denied by the plaintiff in error in proper form and as required by law. The decision of the Supreme Court of the State of Kansas proceeded to render final judgment without any proper determination of the issues of fact so raised, either by hearing before itself or by reference of such questions to a Master or otherwise, contrary to the course of practice and rights accorded to all other litigants.

(*b*) The decision of the Supreme Court of Kansas grants to defendant in error relief and orders totally outside of the relief prayed for by the defendant in error, and grants such relief also on the determination of questions of fact as to which no hearing whatever had been had, either in said court or before a Master, contrary to the uniform course of practice and to the rights accorded to all other litigants.

(*c*) The Supreme Court of Kansas granted final relief to the defendant in error by assuming that allegations of fact made by the defendant in error were true, although denied by the plaintiff in error, and by assuming as true, facts not even alleged by the
87 defendant in error, but facts which were entirely outside of the record in the case, contrary to the uniform practice and to the rights accorded to all other litigants.

(*d*) The Supreme Court of Kansas by its decision and judgment granted relief which amounts to the destruction and confiscation of the property of plaintiff in error, on disputed issues of fact, without a hearing, and without compliance with the forms of law, or the procedure required by the Constitution and Statutes of the State of Kansas in every kind and character of litigation.

(*e*) The decision of the Supreme Court of Kansas while ostensibly upon the pleadings, in fact determined the issues upon the facts without any opportunity whatever being given to the plaintiff in error to present evidence upon those facts and without any hearing of evidence of any kind or character whatsoever, contrary to the uniform custom and requirements of the State of Kansas, and contrary to the rights accorded other litigants.

Wherefore plaintiff in error prays that the final decision of the Supreme Court of Kansas in this cause be reversed by the Supreme Court of the United States.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Plaintiff in Error,
By SAMUEL W. MOORE,
CYRUS CRANE,
ALDIS B. BROWNE,
O. L. MILLER,
Attorneys for Plaintiff in Error.

88 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Kansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Kaw Valley Drainage District of Wyandotte County, Kansas, plaintiff, and The Kansas City Southern Railway Company, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in ques-

89 tion the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said defendant, The Kansas City Southern Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 5th day of July, in the year of our Lord one thousand nine hundred and twelve.

JAMES H. McKENNEY,
Clerk of the Supreme Court
of the United States.

July 5, 1912.

Allowed *by* and to operate as a supersedeas.
WILLIS VAN DEVANTER,
Associate Justice of the Supreme
Court of the United States.

COPY BOUND

90 UNITED STATES OF AMERICA, *ss:*

To The Kaw Valley Drainage District of Wyandotte County, Kansas, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Kansas, wherein The Kansas City Southern Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Willis Van Devanter, Associate Justice of the Supreme Court of the United States, this 5th day of July, in the year of our Lord one thousand nine hundred and twelve.

WILLIS VAN DEVANTER,
Associate Justice of the Supreme Court of the United States.

91 On this 9th day of July, in the year of our Lord one thousand nine hundred and twelve, personally appeared Clarence R. Hall before me, the subscriber, and makes oath that he delivered a true copy of the within citation to C. W. Trickett, one of the Attorneys for defendant in error.

CLARENCE R. HALL.

Sworn to and subscribed the 9th day of July, A. D. 1912.

[Seal Charles A. Peabody, Notary Public, Jackson Co., Missouri.]

CHARLES A. PEABODY,
Notary Public in and for Jackson County, Missouri.

My Commission Expires June 4, 1914.

92 In the Supreme Court of the United States.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Defendant in Error.

Bond.

Know all men by these presents: That we, The Kansas City Southern Railway Company, a corporation organized and existing under and by virtue of the laws of the State of Missouri, as principal, and National Surety Company, a corporation organized and existing under and by virtue of the laws of New York, as surety, are held and firmly bound unto The Kaw Valley Drainage District of Wyandotte

County, Kansas, in the sum of One Hundred Thousand Dollars ($100,000) to be paid to the said obligee, to the payment of which, well and truly to be made, the said principal and the said surety bind themselves, their and each of their successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 2nd day of July, A. D. 1912.

Whereas, the above-named plaintiff in error seeks to prosecute its writ of error in the Supreme Court of the United States, to reverse the judgment and decree rendered against it by the Supreme Court of the State of Kansas, in a proceeding wherein The Kaw Valley Drainage District of Wyandotte County, Kansas, was plaintiff, and The Kansas City Southern Railway Company, was defendant;

93 Now, therefore, the condition of this obligation is such that if the above-named plaintiff in error shall prosecute its writ of error to effect, and answer all costs and damages that may be adjudged, if it shall fail to make good its plea, then this obligation shall be void; otherwise, to remain in full force and effect.

[Seal K. C. S. Ry. Co.]

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
By H. VISSCHER, *Its Treasurer,*
NATIONAL SURETY COMPANY,
By P. O. DRAPER, AND
W. H. CLASUM,
Attorneys-in-Fact.

[Nat'l Sur. Co. Seal.]

Attest:
R. J. McCARTY,
Assistant Secretary.

July 5, 1912.

Bond approved and to operate as supersedeas.
WILLIS VAN DEVANTER,
Justice of the Supreme Court of the United States.

94 SUPREME COURT,
State of Kansas, ss:

I, D. A. Valentine, clerk of said court, do hereby certify that there was lodged with me as such clerk on July 10, 1912, in the matter of The Kansas City Southern Railway Company versus The Kaw Valley Drainage District of Wyandotte County, Kansas,

1. The original Bond of which a copy is herein set forth.
2. Two copies of the writ of error, as herein set forth,—one for each defendant, and one to file in my office.

In testimony wheerof, I have hereunto set my hand and affixed the seal of said court at my office, in Topeka, Kansas, this 18th day of July, 1912.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court.

COPY BOUND C

95 UNITED STATES OF AMERICA,
Supreme Court of Kansas, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I have hereunto subscribed my name, and affixed the seal of said Supreme Court of Kansas, in the City of Topeka, this 18th day of July, 1912.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court.

Endorsed on cover: File No. 23,309. Kansas Supreme Court. Term No. 313. The Kansas City Southern Railway Company, plaintiff in error, vs. The Kaw Valley Drainage District of Wyandotte County, Kansas. Filed July 27th, 1912. File No. 23,309.

LOSE IN CENTER

FILED
MAR 11 1914
JAMES D. MAHER

—IN THE—

Supreme Court of the United States

OCTOBER TERM, 1913.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, *Plaintiff in Error,*
vs.
THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, *Defendant in Error.*

No. 313

In Error to the Supreme Court of Kansas.

Brief and Argument for Plaintiff in Error.

SAMUEL W. MOORE,
SAMUEL W. SAWYER,
JAMES M. SOUBY,
Attorneys for Plaintiff in Error.

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—IN THE—

Supreme Court of the United States

OCTOBER TERM, 1913.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, *Plaintiff in Error,*

vs.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, *Defendant in Error.*

No. 313.

In Error to the Supreme Court of Kansas.

Brief and Argument for Plaintiff in Error.

STATEMENT.

This case is here on writ of error to the Supreme Court of the State of Kansas, the opinion of that court being reported in 87 Kan. 272, 123 Pac. 991.

On February 9th, 1912, the Kaw Valley Drainage District of Wyandotte County, Kansas, hereinafter referred to as plaintiff, filed a petition in the Supreme Court of Kansas for a writ

of mandamus against The Kansas City Southern Railway Company, hereinafter referred to as defendant, to compel defendant to elevate its railroad bridge across the Kansas river at Kansas City to a prescribed height. Thereupon an alternative writ of mandamus was issued by the court.

Defendant duly filed its return and answer to the alternative writ. Plaintiff filed a reply to this answer, but afterwards withdrew it and moved for judgment upon the pleadings. This motion was granted and the case was heard merely on briefs and oral argument, no testimony whatever being taken. Since the whole controversy is presented by the pleadings, we feel it will not be out of place to set them out rather fully at this time.

The affidavit and motion upon which the writ issued is as follows, the caption being omitted (Record, pp. 1, 8):

Affidavit and Motion for a Writ of Mandamus.

Comes now the plaintiff and files its motion and affidavit for a writ of mandamus and alleges and shows to the court:

That the plaintiff, The Kaw Valley Drainage District of Wyandotte County, Kansas, is a public corporation duly organized and existing under and by virtue of Chapter 215 of the Session Laws of 1905 of the State of Kansas.

That the defendant The Kansas City Southern Railway Company is a corporation duly organized and existing according to law.

That the Kansas river flows through the Kaw Valley Drainage District and is a navigable stream; that said stream overflowed its banks in 1903 and a large part of the city of Kansas City, Kansas, was flooded and millions of dollars' worth of property lost by reason thereof.

That the Federal Government established harbor lines along said river, which said harbor lines coincide substantially with the lines established by the plaintiff herein for a levee along the banks of said stream.

That under and by virtue of the Statutes of the State of Kansas the plaintiff herein was given authority to determine the height of the lowest point of the super-

structure of all bridges across the said Kansas river within said district, and further empowered by mandamus to compel the raising of bridges in accordance therewith.

That the defendant herein owns a bridge across the Kansas river within the Drainage District which is usually termed "the Ohio bridge."

That heretofore and by virtue of the power in it vested, the plaintiff on or about the 15th of July, 1911, notified the defendant to raise its said bridge 6.5 feet or to the required height of 340.26 feet above St. Louis directrix and to remove the old bridge, superstructure, abutments, piers, piling and wreckage. That the said defendant has failed, neglected and refused so to do.

Wherefore, plaintiff prays a writ of mandamus to the defendant requiring it to commence at once and proceed as rapidly as possible with the raising of its said bridge so that the lowest point of superstructure will be 340.26 feet above St. Louis directrix and that it remove the old bridge, superstructure, abutments, piers, piling and wreckage; that the raising of said bridge and the removing of said obstructions is absolutely necessary in order to prevent overflow of the Kansas river by reason of the fact that at the present elevation said bridge and said obstructions obstruct the flow of water and cause the same to overflow the banks of said stream and to flood the inhabitants contiguous thereto, and for such other and further relief as to the court may seem right and proper.

The citation with which the alternative writ concluded is as follows (Record, p. 10):

Now therefore, we do command you that upon receipt of this writ that you raise and elevate your bridge known as the Ohio avenue bridge over the Kansas river 6.5 feet or so that the lowest point of superstructure will be 340.26 feet above St. Louis directrix, and that you commence said work at once and proceed with the same as rapidly as possible until completed or that you appear before the Supreme Court of Kansas at the State Capitol in Topeka, Kansas, on the 20th day of February, 1912, at 2 o'clock p. m. of said day and show cause by answer filed herein why you will not do so and have you then and there this

writ with your return thereon showing that you have complied with or will comply with the contents hereof or the reasons why you have not or will not do so.

The hearing upon this writ and answer is hereby set for the — day of February, 1912.

The verified return and answer of defendant to the alternative writ is as follows, formal parts being omitted (Record, p. 5):

Return and Answer of the Defendant to the Alternative Writ.

Now comes the above named defendant and for its return and answer to the alternative writ and petition herein, says:

That said defendant denies each and every allegation and averment in said writ and petition contained and set out not hereinafter specifically admitted.

Defendant admits that the plaintiff is a public corporation organized under Chapter 215 of the Laws of 1905 of the State of Kansas.

That the defendant is a railway corporation duly organized and existing according to law.

That the Kansas river flows through the Kaw Valley Drainage District.

That the defendant herein owns a bridge across the Kansas river within the Drainage District, which is usually termed "the Ohio bridge."

Defendant alleges that it is a railway corporation duly organized under the laws of the state of Missouri, and is a resident and citizen of said state of Missouri and not a resident or citizen of the state of Kansas, and as such railway corporation is now and was at the commencement of this action engaged in the business of transporting cars loaded with freight of all kinds in transit from the state of Missouri and from states other than Kansas to and into Wyandotte county and state of Kansas, and from Wyandotte county in the state of Kansas to the state of Missouri and to states other than the state of Kansas.

That the defendant's railway tracks extend from Jackson county, state of Missouri, into and through

Wyandotte county and state of Kansas. That its business is that of a switching company, in the transaction of which business said defendant receives from other railroads handling shipments of goods from states other than Kansas, said railroads having no tracks connected with the industries to which said goods are consigned, and transferring cars loaded with such shipments from Kansas City in the state of Missouri to other railways in Kansas, and placing such cars to be unloaded in Kansas at the various industries along the line of defendant's road in Kansas, and in taking cars loaded at such Kansas industries with goods to be transported to states other than Kansas and delivering such cars in Kansas City, Missouri, to various railroads for transportation to many different states, all of which business is interstate commerce and governed by various Acts of the Congress of the United States and subject to the rules and regulations of the Interstate Commerce Commission of the United States.

That the defendant's railway tracks situated in the state of Missouri extend to and into Wyandotte county, Kansas, and are connected by means of tracks laid upon and across the bridge mentioned in the alternative writ herein, and usually called the Ohio bridge, and said defendant has no connection between its railway tracks in Missouri and its railway tracks in Kansas other than those across said Ohio bridge, and if such connection is destroyed or the use of its said tracks across said bridge is rendered unavailable, said defendant's railway line will be severed and its business as an interstate carrier destroyed, and the business of large numbers of industries in Kansas served by this defendant will be greatly injured and in some cases destroyed.

Defendant further says that the purpose of the writ in this case is to require the defendant to raise the level of its said bridge and tracks across the Kansas river 6.5 feet above their present level and, if this is done, this defendant's said business will be interrupted, its trains cannot be transported across the Kansas river since it will be unable to either go on to or off said bridge with its engines or cars, and its line of road will be cut and all its interstate business effectually destroyed.

That the present height of the defendant's tracks

upon said bridge is such that any additional elevation thereof will preclude the use of said bridge for trains, and the only manner in which such bridge can thereafter become available for use will be by the construction of long approaches at either end thereof elevated several feet above the present surface of defendant's tracks; but defendant says that the approaches to said bridge upon either end rest upon and extend across various public streets in Kansas City, Kansas, which streets are not under the control of this defendant, but under the exclusive control of the city of Kansas City, Kansas.

That said defendant has no right, power, or authority to raise the grade of its tracks or the approaches to said railway bridge unless the grades of the streets upon which said approaches rest are by the order of said Kansas City, Kansas, raised to conform to the grades necessary to the use of said bridge for railroad purposes.

That the city of Kansas City, Kansas, has not raised the grades of any of its said streets upon which said approaches rest, and has refused to make such changes in the grades of said streets as will necessarily be required in the operation of trains by the defendant if the height or elevation of its said railway bridge is increased in accord with the demands of the plaintiff herein, and in fact said city has failed and refused and still does refuse to make any change whatever in the grades of its said streets.

It therefore results that this defendant while at all times ready and willing to comply with any lawful or reasonable request or order of public bodies within the territories wherein it operates, ought not to be required to comply with the demand of the plaintiff as set forth in the petition and writ herein, since such compliance will destroy defendant's railway, compel it to violate its duties as a carrier of interstate commerce, abrogate its contracts with the industries which it serves, and all without due compensation being made to this defendant or any adequate protection to the business interests threatened.

That such demand of the plaintiff as set forth in the petition and writ herein is unreasonable, illegal, arbitrary, and beyond the power of said plaintiff to make, and defendant's compliance therewith would require either a total

destruction of its business as a carrier of commerce or necessitate wrongful and illegal acts of the defendant upon the public streets of Kansas City, Kansas.

Defendant further says that a compliance with the demands of the plaintiff in the reconstruction of its said bridge and the approaches thereto, if permitted, will cost this defendant a sum in excess of thirty thousand dollars, and the destruction of its bridge for railway purposes will injure and damage this defendant many hundred thousand dollars.

That the enforcement of the demands of the plaintiff will be to deprive the defendant of its property without due process of law, and to deny to it the equal protection of the laws contrary to the provisions of Section 1, Article 14, of the Amendments to the Constitution of the United States, and will operate as a direct interference with interstate commerce and a prohibition of interstate commerce, in contravention of the provisions of Section 8, of Article 1, of the Constitution of the United States.

Wherefore, defendant prays that said alternative writ be discharged and for costs.

Defendant was subsequently allowed to amend this return and answer as shown on page 13 of the Record. One of these amendments was the following, to be inserted at the conclusion of the paragraph alleging that the action of plaintiff was unreasonable, illegal and arbitrary:

"And in violation of the Fourteenth Amendment to the Constitution of the United States."

The following is one of the amendments to be inserted immediately preceding the prayer:

"That the defendant has made application to the Chief of Engineers and Secretary of War of the United States for approval of plans for rebuilding the bridge in question and such application is now pending and by reason thereof said bridge cannot be raised without permission of said Federal officials."

The case was heard along with a similar one instituted by plaintiff at the same time against the Kansas City Terminal

Railway Company, now pending in this Court as No. 314, and one judgment was rendered in both cases as follows (Record, p. 16):

> This cause comes on for decision and thereupon it is ordered and adjudged that judgment herein be entered in favor of the plaintiff and against the defendant, and that the peremptory writ of mandamus issue to the defendants commanding them to forthwith remove from the channel of the Kansas river all obstructions of every kind and character where their lines cross the stream, and commanding the Kansas City Terminal Railway Company to clear such channel to a height of 342.773 feet above the St. Louis directrix, and commanding the Kansas City Southern Railway Company to clear such channel to a height of 340.26 feet above the St. Louis directrix. It is further ordered that the defendants pay the costs of this proceeding taxed at $————, and hereof let execution issue.

Defendant's motion for a rehearing was overruled (Record, p. 29) and its petition for a writ of error from this Court was denied (Record, p. 35). The writ of error, with supersedeas, was allowed by Mr. Justice Van Devanter.

A motion to dismiss filed by plaintiff in this Court was overruled. We shall not attempt to argue the question of jurisdiction as an independent proposition. If it can be regarded as still in the case it will be sufficiently presented in the course of our argument of issues raised by the assignments of error.

SPECIFICATION OF ERRORS.

The defendant selects the following from the various assignments of error (Record, pp. 38-41), and specifies them as errors of the Supreme Court of Kansas relied upon herein:

1. **The decision of the court denies to the plaintiff in error the rights, privileges and immunities secured to it by the Constitution of the United States, and particularly in Section 1 of the Fourteenth Amendment to the Constitution of the United States in that it deprives the plaintiff in error of its property without due process of law, and also deprives it of the equal protection of the laws, in these respects, to-wit:**

(a) Defendant in error's pleading, filed in the Supreme Court of the State of Kansas, raised questions of fact which were denied by plaintiff in error in proper form and as required by law. The decision of the Supreme Court of the State of Kansas proceeded to render final judgment without any proper determination of the issues of fact so raised, either by hearing before itself or by reference of such questions to a master or otherwise, contrary to the course of practice and rights accorded to all other litigants.

(b) The decision of the Supreme Court of Kansas grants to defendant in error relief and orders totally outside of the relief prayed for by the defendant in error, and grants such relief also on the determination of questions of fact as to which no hearing whatever had been had, either in said court or before a master, contrary to the uniform course of practice and to the rights accorded to all other litigants.

(c) The Supreme Court of Kansas granted final relief to the defendant in error by assuming that allegations of fact made by the defendant in error were true, although denied by the plaintiff in error, and by assuming as true, facts not even alleged by the defendant in error, but facts which were entirely outside of the record in the case, contrary to the uniform practice and custom and to the rights accorded to all other litigants.

(d) The Supreme Court of Kansas by its decision and judgment granted relief which amounts to the de-

struction and confiscation of the property of plaintiff in error, on disputed issues of fact, without a hearing, and without compliance with the forms of law, or the procedure required by the Constitution and Statutes of the State of Kansas in every kind and character of litigation.

(e) The decision of the Supreme Court of Kansas, while ostensibly upon the pleadings, in fact determined the issues upon the facts without any opportunity whatever being given to the plaintiff in error to present evidence upon those facts and without any hearing of evidence of any kind or character whatsoever, contrary to the uniform custom and requirements of the state of Kansas, and contrary to the rights accorded other litigants.

2. The plaintiff in error is deprived of its property without due process of law in that it has never been given a hearing or had an opportunity to present evidence either before the defendant in error or before any court or other tribunal as to the cost or necessity of raising its bridge or doing any of the other acts desired and prayed for by the defendant in error or ordered by the court, and in holding that the plaintiff in error could be required to raise or remove its bridge or perform the other acts ordered by the court, the Supreme Court of Kansas denied the plaintiff in error the rights, privileges and immunities guaranteed to it by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

3. The court erred in that, while it appeared that the authority sought to be exercised under the said Act (G. S. Kansas 1909, Art. 3, ch. 34) in this case was repugnant to the Act of Congress of the United States of March 3, 1899 (Chap. 425, Sec. 9, 30 Statutes at Large, page 1151), yet the court in its decision orders indirectly that which it admits it could not order directly except in violation of the said Act of Congress.

4. The decision of the Supreme Court of Kansas in this case is repugnant to the Act of Congress of the United States of March 3, 1899 (Chap. 425, Sec. 9, 30 Statutes at Large 1151), in that no plans for the changing or raising of plaintiff in error's bridge, as ordered by the Supreme Court of Kansas, have been approved by the Chief of Engineers or the Secretary of War, either upon the application of the defendant in error or anyone else.

5. The decision of the court is repugnant to the Act of Congress of the United States of June 15, 1866 (R. S., Sec. 5258, 14 Statutes at Large 66), and denies to plaintiff in error the rights, privileges and immunities secured to it by said Act, in that the plaintiff in error is deprived of its right to carry upon and over its road and bridge all passengers, troops, government supplies, mails, freight and property on their way from one state to another state and to receive compensation therefor, and to connect with roads of other states so as to form continuous lines for the transportation of same to the places of destination.

6. The court erred in holding that the alleged action of the defendant in error in regard to plaintiff in error's bridge is not in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that it deprives the plaintiff in error of its property without due process of law, and in that it deprives the plaintiff in error of the equal protection of the laws.

7. The court erred in holding that the alleged action of the defendant in error in regard to plaintiff in error's bridge does not deprive the plaintiff in error of its property without due process of law, and of the equal protection of the laws, in that it seeks to compel the plaintiff in error to commit a nuisance and unlawful acts upon the streets of Kansas City, Kansas, and to commit other unlawful acts by interfering with the property of other persons and corporations.

8. The decision of the court is in violation of the Fourteenth Amendment to the Constitution of the United States in that it orders and seeks to compel the plaintiff in error to commit a nuisance and unlawful acts in the streets of Kansas City, Kansas, and to commit other unlawful acts by interfering with the property of other persons and corporations.

9. The court erred in holding that the authority sought to be exercised by defendant in error under the said Act is not in violation of Section 8, Article 1, of the Constitution of the United States which confers upon Congress the exclusive power to regulate commerce among the several states.

BRIEF.

It will be noted from the foregoing statement of facts that defendant's answer to the alternative writ did not attack the validity of the Drainage Act of Kansas (L. 1905, Ch. 215; G. S. 1909, Art. 3, Ch. 34), under which this proceeding arose; it confined its attack to the validity of the action sought to be taken by plaintiff thereunder. So in this Court the validity of that Act cannot and will not be raised; our brief will be confined to matters properly raised upon the assignments of error—the validity of the action of plaintiff and of the Supreme Court of Kansas, as instrumentalities of the state, in attempting to exercise the powers and authority granted by its laws.

I.

The proceedings in the Supreme Court of Kansas upon which judgment was rendered in this case operate as a denial to defendant of the equal protection of the laws and as a deprivation of its property without due process of law.

The above proposition, it is to be noted, has no reference to the effect of the judgment of the Supreme Court of Kansas in this case. That will be attacked later. What is complained of here is simply the method pursued by the court in arriving at its decision.

That the prohibitions of the Fourteenth Amendment refer to and control all branches of the state government, legislative, executive and judicial, is so well settled at this late date as hardly to merit assertion. *Home Telephone Co.* v. *Los Angeles*, 227 U. S. 278; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226; *Blake* v. *McClung*, 172 U. S. 239, 260; *Scott* v. *McNeal*, 154 U. S. 34, 35; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373; *Ex parte Virginia*, 100 U. S. 339, 346.

In *Chicago, B. & Q. R. Co.* v. *Chicago, supra*, Mr. Justice Harlan says in the opinion, page 233:

> "But it must be observed that the prohibitions of the amendment refer to all the instrumentalities of the state, to its legislative, executive and judicial authorities, and, therefore, whoever, by virtue of public position under a state government, deprives another of any right protected by that amendment against deprivation by the state, violates the constitutional inhibition, and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state. This must be so, or, as we have often said, the constitutional prohibition has no meaning and the state has clothed one of its agents with power to annul or evade it."

While the line of demarcation between the two conceptions, "equal protection of the laws" and "due process of law," is not always clearly defined and the two frequently overlap, yet in the present instance we rest our contentions with reference to them on wholly different and distinct considerations and shall treat of each contention separately.

1. *The method of procedure followed by the Supreme Court of Kansas in this case was in violation of the laws of that state regulating the practice in such cases, was different from that which would or could be lawfully applied to any other person in the state in a similar case, and denied to defendant the equal protection of the laws.*

In *Tinsley* v. *Anderson*, 171 U. S. 101, this Court in overruling the contention that a certain procedure in a state court denied to defendant the equal protection of the laws, said, page 106:

> "The right to the equal protection of the laws was certainly not denied, for it is apparent that *the same law or course of procedure* which was applied to Tinsley *would have been applied to any other person in the state of Texas, under similar circumstances and conditions;* and there is nothing in the record on which to base an inference to the contrary."

Similar statements are to be found in *Minder* v. *Georgia*, 183 U. S. 559, and in *Andrus* v. *Insurance Assn.*, 168 Mo. 151, 162.

The converse of the proposition stated in the above cases would seem necessarily to follow, and is, in fact, laid down as the rule in *Ex parte Stricker*, 109 Fed. 145, 150:

> "The equal protection of the law is denied by a state court when it is apparent that the same law or course of procedure would not and could not lawfully be applied to any other person in the state under similar circumstances."

Section 6318 of the Revised Statutes of Kansas of 1909 provided with reference to the procedure to be followed in mandamus proceedings:

> "No other pleading or written allegation is allowed than the writ and answer. These are the pleadings in the case, and have the same effect, and are to be construed, and may be amended, in the same manner as pleadings in a civil action; and the issues thereby joined must be tried and the further proceedings thereon had in the same manner as in a civil action."

In the case of *Crans* v. *Frances*, 24 Kan. 750, Mr. Justice Brewer, in commenting upon the effect of the statutory provisions, said:

> "The entire nature of this proceeding (mandamus) is, as we have had occasion heretofore to notice, changed by statute. It is now, in its form, very like an ordinary action. No other pleadings are allowed than the writ and answer. These pleadings are to be construed, and to have the same effect, as proceedings in a civil action; and the issues are to be tried, and further proceedings had, as in a civil action."

In the present case all of the material allegations in the alternative writ stood denied by defendant's answer. Can it be doubted that in any other civil action, or in any other mandamus suit, plaintiff would have been required to support them by some proof before it would be awarded the final relief prayed for?

In the present case defendant's answer, by its affirmative allegations, raised several issues of fact, one of which was as

to whether there was a reasonable necessity for the demand of plaintiff that it elevate its bridge, or whether that demand was unreasonable and arbitrary. Can it be doubted that in any other civil action, or in any other mandamus suit, the court would have permitted the defendant to offer evidence in substantiation of such allegations, instead of taking as true the contrary and controverted allegations of the plaintiff?

It should be emphasized right here that the court did not hold that the defenses set up by defendant, if true, would not in law be sufficient to defeat the action; if it had so held, then there would doubtless be no force in our contention that its method of procedure denied defendant the equal protection of the laws, however vulnerable its judgment might be on other grounds. The fact is, the court absolutely ignored this defense in the case of this defendant, not even mentioning it in summarizing the contents of its answer in the beginning of the opinion. The only place in the opinion where any reference is made to the validity of such a defense is where it is discussed with reference to the companion case decided at the same time (Record, page 20):

> "The allegation of the plaintiff is that the flood of 1908 made it necessary to elevate the bridge as demanded, while the allegation of the defendant is that the requirement is arbitrary and capricious. As the plaintiff is a public corporation manifestly created for the purpose of preserving and protecting life and property from the ravages of floods, it must be presumed that its officers are acting in good faith and with sufficient cause and reason, and that *prima facie*, at least, their conclusion as to present requirements is correct."

The case is not helped if the above may be taken as applying equally to the answer of this defendant. Whether or not the court erred in holding, in the absence of a statute so providing, that in a suit brought to enforce its own orders plaintiff would be presumed to be acting within reason and in good faith, it is not necessary to discuss here. That could not obviate the necessity of giving defendant the opportunity to

overcome this presumption by proof. It could only operate to shift the burden of proof to defendant.

The laws of Kansas make the orders of its Railroad Commission *prima facie* reasonable in all proceedings brought in the courts to enforce them. This, however, is not sufficient to prevent defendant from setting up in its answer in the Supreme Court to an alternative writ of mandamus issued therefrom that, as a matter of fact, a particular order of the Commission which is sought to be enforced is arbitrary and unreasonable; and is not sufficient to prevent defendant from obtaining an inquiry into the issue of fact thus raised. This much, at least, is to be gathered from the decision of the Kansas court in the case of *State* v. *Mo. P. R. Co.*, 92 Pac. 606, which was affirmed by this Court in *Mo. P. R. Co.* v. *State*, 216 U. S. 262.

Again, the citation in the alternative writ commanded defendant to raise its bridge to a certain elevation or appear on a certain day and show cause why it would not do so. Defendant chose the latter alternative, made its appearance and gave as one reason why its bridge could not be raised the fact that this could not be done without the consent of the chief of engineers and the Secretary of War of the United States, which had not been gained (Record, p. 14). This the court itself, in its opinion, held to be an insuperable obstacle to the enforcement of the command of the writ (Record, p. 22):

> "It is a familiar doctrine that when Congress has legislated upon a subject within its power, such legislation is binding upon the states, and for us to hold now that the defendant can be compelled by mandamus to raise its bridge as demanded without obtaining the approval of the plans therefor as required by Congress would be to disregard rather than to obey such legislation."

In spite of this holding, however, the court proceeded to enter a final order commanding defendant to do an entirely different thing, something not mentioned in the citation, something about which defendant was given no notice and concern-

ing which it had no opportunity to be heard. Defendant was ordered to remove its bridge absolutely, not merely to elevate it. Is it imaginable that such a course of procedure would have been applied to any other person in the state of Kansas in any other civil action, or in any other mandamus proceeding?

This case was set down by the court for argument on the pleadings. It is said in the opinion (Record, p. 18):

> "The plaintiff withdrew its reply and moved for judgment on the pleadings, and although in the brief there is a long detailed statement of alleged facts, we can only consider the case upon the allegations contained in the writ and in the answer and return."

In spite of this fact, however, it appears from the court's opinion (Record, p. 20) that plaintiff submitted certain documentary evidence in support of the allegations of the alternative writ and that the court gave careful consideration to this evidence. Will it be pretended that such a course of procedure would have been followed in any other similar case?

It would thus appear unnecessary to go further in an effort to show that *the method of procedure we here criticise was one which never has been and never could be lawfully applied to any other person in Kansas in a similar case*, and that it denied to defendant the equal protection of the laws within the meaning of the prohibition contained in the first paragraph of the 14th Amendment.

2. *The method of procedure adopted by the Supreme Court of Kansas in this case violated fundamental rights secured to defendant by the law of the land, and operates to deprive it of its property without due process of law.*

The foregoing argument with reference to a denial of equal protection of the laws was predicated upon the fact that the procedure complained of was contrary to the laws of Kansas. Our argument under the present head will have no reference to what those laws may or may not have authorized; it will be our contention here that the procedure followed by the Kansas court in this case was one which could not have

been authorized by the state, even though its constitution expressly provided for it. This is what has been laid down by this Court as the test when it is claimed that the method of procedure in a state court has operated to deprive a party of his property without due process of law. It is said in *Rawlins* v. *Georgia*, 201 U. S. 638, 640:

> "If the state constitution and laws as construed by the state court are consistent with the Fourteenth Amendment, we can go no further. The only question for us is, whether a state could authorize the course of proceedings adopted, if that course were prescribed by its constitution in express terms."

It can make no difference for the purpose of our argument here whether the procedure adopted by the Kansas court was one authorized by the laws of the state or one merely arbitrarily adopted by the court for this particular case, for, as we have already seen, the 14th Amendment controls the judicial no less than the legislative branch of the state government.

We quote from the opinion of this Court in the case of *Hovey* v. *Elliott*, 167 U. S. 409, 417:

> "How can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative sanction, would be violative of the constitution?"

However careful this Court has been in the past to avoid an attempt at precise definition of "due process of law," always preferring the wiser course of working out its full intent and application "by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning upon which such decisions may be founded" (*Davidson* v. *New Orleans*, 96 U. S. 97), still a mere cursory glance at its decisions will reveal that it has never hesitated to include the presence of notice and hearing as a fundamental and essential element, if not, indeed, as constituting the very essence of "due process." This is one of the fundamental conceptions of the phrase embodied in Mr. Webster's famous

definition, although it would seem that the idea was by no means original with that great advocate. We find in the opinion by Fortescue, J., in *Rex* v. *Cambridge University*, 1 Stra. 558, 567:

> "The laws of God and man both give the party an opportunity to make his defense, if he has any. I remember to have heard it observed by a very learned man upon such an occasion that even God himself did not pass sentence upon Adam, before he was called upon to make his defense. Adam (says God), where art thou? Hast thou not eaten of the tree, whereof I commanded thee that thou shouldst not eat? And the same question was put to Eve also."

The decisions of this Court in which the same principle has been announced are almost too numerous to mention. We shall merely cite: *Ochoa* v. *Hernandez*, 230 U. S. 139, 161; *Hooker* v. *Los Angeles*, 188 U. S. 314, 318; *Davidson* v. *New Orleans*, 96 U. S. 97; *Hagar* v. *Reclamation District*, 111 U. S. 701, 708; *Hovey* v. *Elliott*, 167 U. S. 409, 414; *Holden* v. *Hardy*, 169 U. S. 366, 389.

In *Londoner* v. *Denver*, 210 U. S. 373, the court points out that in the assessment, apportionment and collection of taxes upon property within their jurisdiction, the Constitution of the United States imposes few restrictions upon the states. Yet even in this exercise of its governmental powers by the state, the court holds, page 385:

> "Due process of law requires that, at some stage of the proceedings, before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice either personal, by publication, or by a law fixing the time and place of the hearing."

We desire it distinctly understood that we are not here attacking, *sub nomine*, the action by which plaintiff sought to procure the enforcement of its orders; that is, we are not contending that *mandamus* was an improper remedy because defendant was entitled to have the issues of fact raised by the pleadings tried before a jury. Nothing of that sort is in mind.

We are aware of the principle laid down by this Court many times and expressed as follows in *Hooker* v. *Los Angeles*, 188 U. S. 314, 318:

> "The Fourteenth Amendment does not control the power of a state to determine the form of procedure by which legal rights may be ascertained, *if the method adopted gives reasonable notice and affords a fair opportunity to be heard.*"

It is exactly on the ground expressed in the words which we have italicized in the above quotation that we assail the method of procedure applied by the Kansas court in this case. Our contention is that *it did not give reasonable notice and a fair opportunity to be heard;* that it was neither suitable nor admissible in a case such as this, where a person is being deprived of his property under the guise of a police regulation of the state.

Mr. Justice Bradley said in *Davidson* v. *New Orleans*, 96 U. S. 97, 107:

> "I think, therefore, we are entitled, under the Fourteenth Amendment, not only to see that there is some process of law, but 'due process of law,' provided by the state law when a citizen is deprived of his property, and that, in judging what is 'due process of law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law'; but if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law.'"

It is to be noted that the Kansas Act (L. 1905, Ch. 215; G. S. 1909, Art. 3, Ch. 34), from which the plaintiff derives its authority, makes no provision whatever for notice and hearing as a prerequisite to the exercise by plaintiff of its power "to condemn and cause obstructions in such water courses to be removed" and "to prescribe, regulate and fix the height of the superstructures above the water, the length of all spans and

the location of the piers of all bridges across water courses situated in the district." The only possible theory, then, upon which the Act could be held valid is that the person interested may always secure a hearing by contesting the validity of any order of the Drainage Board in the courts. *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 418. The Act nowhere attempts to make the findings of the Drainage Board conclusive on the courts, and the court in this case did not pretend to put any such construction upon its provisions.

It appears from the pleadings that the plaintiff did not give defendant any opportunity to be heard before determining upon the alleged necessity of making the change demanded in defendant's bridge. The question here is solely whether or not a fair opportunity of being heard was accorded defendant by the Kansas court. This may be determined, we think, by considering its treatment of only one of the issues raised by defendant's answer, that of the reasonableness of plaintiff's demands.

In *Mo. P. R. Co.* v. *Nebraska*, 217 U. S. 196, this Court said in its opinion, page 206:

> "It also is true that the states have power to modify and cut down property rights to a certain limited extent without compensation, for public purposes, as a necessary incident of government—the power commonly called the police power. But railroads, after all, are property protected by the Constitution, and there are constitutional limits to what can be required of their owners under either the police power or any other ostensible justification for taking such property away."

One of these limitations upon the exercise by the state of its police power, through any of its instrumentalities, is that *its action must be reasonable and not arbitrary*, and whether or not it is so in any case where its validity is properly challenged on this ground *is always a question of fact to be inquired into by the court* and determined in the light of all the circumstances. *Chicago, B. & Q. R. Co.* v. *Ill.*, 200 U. S. 561; *Washington* v. *Fairchild*, 224 U. S. 510; *Chicago, B. & Q. R.*

Co. v. *Chicago*, 166 U. S. 226; *Dobbins* v. *Los Angeles*, 195 U. S. 223, 235, 239; *Mugler* v. *Kansas*, 123 U. S. 623, 661; *Lawton* v. *Steele*, 152 U. S. 133; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 558; *Yates* v. *Milwaukee*, 10 Wall. 497.

This Court said in *Chicago, B. & Q. R. Co.* v. *Illinois*, *supra*, page 592:

> "And the validity of a police regulation, whether established directly by the state or by some public body acting under its sanction, must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable, and whether really designed to accomplish a legitimate public purpose. * * * If the means employed have no real, substantial relation to public objects which government may legally accomplish; if they are arbitrary and unreasonable, beyond the necessities of the case, the judiciary will disregard mere forms and interfere for the protection of rights injuriously affected by such illegal action. The authority of the courts to interfere in such cases is beyond all doubt. *Minnesota* v. *Barber*, 136 U. S. 313, 320."

And in *Lawton* v. *Steele*, *supra*, it is said on page 137:

> "The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is the proper exercise of its police power is not final or conclusive, but is subject to the supervision of the courts."

It can make no difference in the present case that the police power is here ostensibly invoked in behalf of the public safety, for this power is the same and is subject to the same tests for its validity whether invoked for the protection of the public health, safety and morals, or merely the advancement of the general convenience and well-being of the community. *L. S. & M. S. R. Co.* v. *Ohio*, 173 U. S. 285; *Bacon* v. *Walker*, 204 U. S. 311; *C. B. & Q. R. Co.* v. *Illinois*, 200 U. S. 561, 592; *Manigault* v. *Springs*, 199 U. S. 473; *License Cases*, 5 How. 504, 583.

The court said in *L. S. & M. S. R. Co.* v. *Ohio, supra,* on page 300 of the opinion:

> "Consistently with these doctrines it cannot be adjudged that the Ohio statute is uncontstitutional. The power of the state by appropriate legislation to provide for the public convenience stands upon the same ground precisely as its power by appropriate legislation to protect the public health, the public morals, or the public safety. Whether legislation of either kind is inconsistent with any power granted to the general government is to be determined by the same rules."

In the present case defendant's answer denied that there was any reasonable necessity for the action sought to be enforced by plaintiff, as alleged in the alternative writ, but asserted that on the contrary, plaintiff's demand that it elevate its bridge was *unreasonable* and *arbitrary* and that its enforcement would deprive defendant of its property without due process of law and deny it the equal protection of the laws. No exception was taken by motion or otherwise to the sufficiency of the answer to raise this issue, and the opinion of the Kansas court herein makes no point in this regard.

To say that the mere permission to argue the case orally and to file a brief herein, which is all that was granted defendant, amounted to a hearing within the meaning of that term as used by the courts when giving it as an essential element in "due process of law," is absolutely to disregard the substance and lean upon the mere form of the word. As this Court said in *Washington* v. *Fairchild,* 224 U. S. 510, 524, speaking of a contention made against a statute of Oregon that it was invalid because it did not provide for notice and hearing:

> "If this were true, the defendant's position would be correct, for the hearing which must precede the taking of property is not a mere form. The carrier must have the right to secure and present evidence material to the issue under investigation. It must be given the opportunity by proof and argument to controvert the claim asserted against it before a tribunal bound not only to

listen, but to give legal effect to what has been established."

And in *Fayerweather* v. *Ritch*, 195 U. S. 276, this Court said on page 299:

"Although these plaintiffs were parties to the proceedings in the state courts, and presented their claim of right, if it be true that the necessary result of the course of procedure in those courts was a denial of their rights—a taking away and depriving them of their property without any judicial determination of the fact upon which alone such deprivation could be justified—a case is presented coming directly within the decision in 166 U. S. *supra*." (*Chicago, B. & Q. R. Co.* v. *Chicago.*)

As pointed out in our preceding argument, there was no determination of this issue raised by defendant's answer; the court absolutely ignored it both in its statement of the pleadings and in its decision of the case. This was an issue properly before the court on the pleadings; due process would require that it be determined before judgment could be rendered.

As said in the case quoted from last above, page 301:

"The state court was one of competent jurisdiction, and the present contestants were before that court, taking part in the litigation. The validity of the releases was put in issue by the pleadings, and no judgment could properly have been rendered without a determination of that question."

The action of the court in its treatment of this issue was as though it had struck down defendant's answer of its own accord and proceeded to judgment as on confession. Defendant here was not even in contempt of the court as was the case in *Hovey* v. *Elliott*, *supra*, yet this Court refused to sanction any such procedure in that case, saying, page 446:

"There is no distinction in principle between determining a cause upon issues not raised by the pleadings in the actual absence of the party, and rendering a decree by refusing to permit a defendant to be heard in his

defense or to consider the merits of a sufficient defense, and, indeed, by striking the pleading containing such defense from the files."

Defendant here was not even an alien enemy as was the case in *Windsor* v. *McVeigh*, 93 U. S. 274, and *McVeigh* v. *U. S.*, 11 Wall. 267, yet this Court, in the strongest terms, condemned such a method of procedure in those cases, saying in its opinion in the former, page 277:

> "A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, Appear, and you shall be heard; and, when he has appeared, saying, Your appearance shall not be recognized, and you shall not be heard. In the present case the District Court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict, clothed in the form of a judicial sentence."

We have said that the necessary element of notice also was lacking in the form of procedure adopted by the Supreme Court of Kansas. This is absolutely apparent when we consider the variance between the citation of the alternative writ and the final order of the court, as pointed out in our preceding discussion of this feature.

Going back to the test with which we started out in our argument upon this phase of the case, is it conceivable that a state could authorize the course of procedure adopted in this case, even though that course were specifically authorized by its Constitution? Could a state authorize a procedure by which a person being haled into court to show cause why he should not be deprived of his property is yet not permitted to prove the existence of facts which present an unquestioned reason why his property should not be taken? Or could a state authorize a procedure under which a party has been notified to appear in court and show cause why he should not be

required to do a certain act, and then, after he has shown to the satisfaction of the court why he cannot lawfully be required so to do, nevertheless, without further notice and without opportunity to be heard further, is ordered by the court to do a wholly different thing?

Unless the above questions can be answered in the affirmative, then the method of procedure followed by the Kansas court in the present case, whatever kind of process it may have been, was not "due process of law" within the meaning of that term as heretofore construed by this Court.

II.

If the procedure adopted by the Supreme Court of Kansas in this case is not sufficient to invalidate its judgment herein for the reasons stated in the preceding argument, then that judgment is still invalid, because in itself it deprives defendant of its property without due process of law.

Should this Court fail to sustain our contention made under the preceding proposition, as to the invalidity of the method of procedure by which the Kansas court arrived at its decision in this case, that determination can only be fatal to the validity of the judgment rendered by that court herein. From our standpoint, it can make no difference whether the invalidity may be held to inhere in the method pursued or in the result attained. We quote from the opinion in the case of *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 236:

> "The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation."

And again on page 234 it is said:

> "Nor is the contention that the railroad company has been deprived of its property without due process of law

entirely met by the suggestion that it had due notice of the proceedings for condemnation, appeared in court, and was admitted to make defense. It is true that this court has said that a trial in a court of justice according to the modes of proceeding applicable to such a case, secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice—the court having jurisdiction of the subject matter and of the parties, and the defendant having full opportunity to be heard—met the requirement of due process of law. *United States* v. *Cruikshank*, 92 U. S. 542, 544; *Leeper* v. *Texas*, 139 U. S. 462, 468. But a state may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance, not to form."

To hold that the procedure followed by the Kansas court in this case was lawful, is necessarily to hold that the court did give full consideration to all issues raised by defendant's answer, and decided as a matter of law that these facts, if true, constituted no defense to the action. The only question to be considered, then, is, Would a judgment so holding be invalid as depriving defendant of its property without due process of law?

(a) As applied to the one issue of the reasonableness of plaintiff's demand, this question can only be answered in the affirmative, in view of the decisions which we have already cited on this point in our preceding argument. We add, however, the following quotations from two of them.

In *Washington* v. *Fairchild*, 224 U. S. 510, we find in the opinion on page 523:

"The commission's order requiring the Oregon Company to make track connection was not a mere adminis-

trative regulation, but it was a taking of property, since it compelled the defendant to expend money, and prevented it from using for other purposes the land on which the tracks were to be laid. Its validity could not be sustained merely because of the fact that the carrier had been given an opportunity to be heard, but was to be tested by considering whether, in view of all the facts, the taking was arbitrary and unreasonable, or was justified by the public necessities which the carrier could lawfully be compelled to meet. For the guaranty of the Constitution extends to the protection of fundamental rights—to the substance of the order as well as to the notice and hearing which precede it. 'The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation.' *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 236; *Missouri P. R. Co.* v. *Nebraska*, 164 U. S. 403, 416. So that, where the taking is under an administrative regulation, the defendant must not be denied the right to show that, as a matter of law, the order was so arbitrary, unjust, or unreasonable as to amount to a deprivation of property in violation of the Fourteenth Amendment. *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 418; *Smyth* v. *Ames*, 169 U. S. 466; *Chicago, M. & St. P. R. Co.* v. *Tompkins*, 176 U. S. 167, 173."

In *Yates* v. *Milwaukee*, 10 Wall. 497, it is said, page 505:

"But the mere declaration by the City Council of Milwaukee that a certain structure was an encroachment or obstruction did not make it so, nor could such declaration make it a nuisance unless it in fact had that character. It is a doctrine not to be tolerated in this country that a municipal corporation, without any general laws either of the city or of the state, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city, at the uncontrolled will of the temporary local authorities. Yet this seems to have been the view taken by counsel who defended this case in the Cir-

cuit Court; for that single ordinance of the city, declaring the wharf of Yates a nuisance, and ordering its abatement, is the only evidence in the record that it is a nuisance or an obstruction to navigation, or in any manner injurious to the public."

It might be well to emphasize that we are not attempting to assert that a mere erroneous decision by a state court of a question of law will in all cases raise a question under the 14th Amendment. The fallacy of such a contention was pointed out by this Court in *Iowa C. R. Co.* v. *Iowa*, 160 U. S. 389. That case, like this, was a proceeding in mandamus which was decided on the pleadings. Unlike this, however, the defenses set up in the answer in that case were not based upon any claim of right under the Federal Constitution. In this case, on the contrary, defendant's answer alleged that an enforcement of plaintiff's order would be in violation of the 14th Amendment, since its demand was unreasonable and abritrary.

We are so confident of the correctness of our position in this regard that we feel that we should only burden the court unduly by extending our argument on this phase of the proposition.

(b) Another matter set up in defendant's answer emphasizes the fact that its defense was based upon a claim of right under the Constitution and laws of the United States. Its answer alleged that it was engaged in interstate commerce, with a line at Kansas City extending from Missouri into Kansas, and that the elevation of its bridge as demanded by plaintiff would sever the only means of connection between its line in the two states and prohibit it from continuing its business as an interstate carrier, since it would no longer be able to operate its trains over the bridge owing to its elevation above that of the approaches at either end; that these approaches extended across public streets of Kansas City, Kansas, and their elevation would necessitate a change in the grade of those streets; that defendant had no power or authority to raise the grade of its tracks or the approaches to its bridge

without the consent of the city, and that the city had not given, but had refused to give, its consent thereto. For these reasons, it was alleged, the enforcement of plaintiff's demand would be in contravention of Section 8 of Article 1 of the Constitution, or, as stated in the assignments of error, would deprive defendant of rights and privileges secured to it by the Act of Congress of June 15, 1866 (R. S. Sec. 5258, 14 Stat. L. 66).

The Kansas court did not ignore these allegations, but in its opinion (Record, p. 23) clearly recognized the issues raised by them:

> "There remain questions concerning the power or propriety of granting the writs prayed for in view of the conditions set forth by the defendant as to the raising of grade to provide proper approaches for the bridges when so raised. We are met squarely by the question whether we can or should compel the defendants to put their bridges up to an altitude, which, without the raising of approaches, would render them absolutely useless and destroy the business and interstate possibilities of the defendant companies and whether they should be required to do this upon the theory that it rests upon them to find some way to compel or induce the city and the owners of intersecting railway tracks to permit such raising of the bridges and take care of the consequent alleged damages to abutting property."

However, it met this issue by engaging in another of its presumptions (Record, p. 25):

> "As to the suggestion that the issuance of the writs would force the defendants into controversies with the city and with other railroad companies, it may be observed that were the defendants seeking the privilege of raising their bridges they would doubtless find a way to secure the assent of the other interested parties, and it must be left to them to take care of whatever contingencies may arise by obedience to the requirements of the writs. Such other interested parties cannot well put themselves in the attitude of unreasonable hostility to the orders of this court or to the welfare of the people comprising the drainage district, and it cannot be presumed they will do so."

Defendant's bridge was a lawful structure, having been built under the powers granted to all railroads in the state of Kansas by G. S. Kan. 1868, Ch. 23, Sec. 47; G. S. 1909, Sec. 1763:

> "To construct its road across, along or upon any stream of water, watercourse, street, highway, plank road, or turnpike, which the route of its road shall intersect or touch; but the company shall restore the stream, watercourse, street, highway, plank road or turnpike thus intersected or touched, to its former state, or to such state as to have not necessarily impaired its usefulness. Nothing herein contained shall be construed to authorize the construction of any railway not already located in, upon or across any street in any city incorporate, or town, without the assent of the corporate authorities of such city."

Defendant was further secured in the use of its bridge by the Act of Congress of June 15, 1866, which provides:

> "Every railroad company in the United States, whose road is operated by steam, its successors and assigns, is hereby authorized to carry upon and over its road, boats, bridges, and ferries, all passengers, troops, government supplies, mails, freight, and property on their way from any state to another state, and to receive compensation therefor, and to connect with roads of other states so as to form continuous lines for the transportation of the same to the place of destination."

It is well settled that the police power of a state, for whatever purpose sought to be exercised, cannot legitimately be exerted so as substantially to prohibit or *unnecessarily to burden interstate commerce*. *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229; *Atlantic C. L. R. Co.* v. *Wharton*, 207 U. S. 328; *Mississippi Railroad Commission* v. *Illinois Central R. Co.*, 203 U. S. 335; *Illinois Central R. Co.* v. *Illinois*, 163 U. S. 142; *Cleveland, etc., R. Co.* v. *Illinois*, 177 U. S. 514; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1; *Hannibal, etc., R. Co.* v. *Husen*, 95 U. S. 465; *Mo. K. & T. R. Co.* v. *Haber*, 169 U. S. 613.

Likewise, as we have seen to be true with reference to the 14th Amendment, to be repugnant to the commerce clause

of the Constitution or the acts of Congress thereunder, the action complained of need not be that of the legislature, but may be any exercise of state authority by any agency of the state government.

It is said in *Atlantic C. L. R. Co.* v. *Wharton*, *supra*, page 334:

> "That any exercise of state authority, in whatever form manifested, which directly regulates interstate commerce, is repugnant to the commerce clause of the Constitution, is obvious. It hence arises that any command of a state, whether made directly or through the instrumentality of a railroad commission, which orders, or the necessary effect of which is to order, the stopping of an interstate train at a named station or stations, if it directly regulates interstate commerce, is void."

It is just as well settled, of course, that action by the state, if otherwise unobjectionable, may be upheld even though it affects interstate commerce, provided its operation on such commerce is only indirect and remote. As said by Mr. Justice Brown in *Austin* v. *Tenn.*, 179 U. S. 343, 349:

> "We have had repeated occasion to hold, where state legislation has been attacked as violative, either of the power of Congress over interstate commerce, or of the Fourteenth Amendment to the Constitution, that, if the action of the state legislature were a *bona fide* exercise of its police power, and dictated by genuine regard for the preservation of the public health or safety, such legislation would be respected, though it might interfere indirectly with interstate commerce."

Thus, it has been said that the states may legislate with respect to the instrumentalities of interstate commerce, so far as such legislation is within their ordinary police powers. *Louisville, etc., R. Co.* v. *Kentucky*, 161 U. S. 677. Such cases have always been sustained, however, upon the theory *that such regulations aid rather than burden such commerce;* and it is clear that a state cannot make such requirements of an interstate carrier as will impair or destroy the usefulness of its facilities. *Atlantic C. L. R. Co.* v. *Wharton*, *supra*; *Missis-*

sippi Railroad Commission v. *Illinois Central R. Co., supra; Cleveland, etc., R. Co.* v. *Illinois, supra; Illinois Central R. Co.* v. *Illinois, supra.*

This Court said in *Illinois Central R. Co.* v. *Illinois, supra,* page 154:

> "The state may make reasonable regulations to secure the safety of passengers, even on interstate trains, while within its borders, but the state can do nothing which will directly burden or impede the interstate traffic of the company, *or impair the usefulness of its facilities for such traffic.*"

From the cases cited last above it appears that whether or not a requirement sought to be made by a state of an interstate carrier amounts to a direct regulation of interstate commerce or merely affects it indirectly and remotely, may be tested by considering whether or not such a requirement is reasonably necessary. If it affects or burdens interstate commerce *unnecessarily*, it will be held to be invalid as a direct interference with the exclusive power of Congress to regulate such commerce. This is the test expressly announced in *Atlantic C. L. R. Co.* v. *Wharton, supra,* where this Court was considering the validity of an order of the state railroad commission which sought to require the stopping of an interstate passenger train at a certain station in South Carolina.

It is said on page 334:

> "But the effect of the order as a direct regulation of interstate commerce may also be tested by considering the adequacy of the local facilities existing at the station or stations at which the interstate commerce train has been commanded to stop. True, inherently considered, whether there be adequate local facilities is not a Federal question, but in so far as the existence of such adequate local facilities is involved in the determination of the Federal question of whether the order concerning an interstate train does or does not directly regulate interstate commerce, that question for such purpose is open and may be considered by us."

In view of these well settled principles, if the judgment of the Kansas court in this case was based upon a decision that the order of the plaintiff was a valid exercise of its delegated police power, even though arbitrary and founded upon no reasonable necessity, and although its enforcement would absolutely disrupt defendant's line of railroad and prohibit it from continuing its business thereon as an interstate carrier, then that judgment cannot stand.

The same invalidity, we contend, would inhere in this judgment, even though the raising of defendant's bridge were admitted to be a reasonable and necessary requirement for the end alleged, and even though it were admitted that a state may for the protection of the safety of its inhabitants go to the extent of destroying an instrumentality indispensable to the continued operation of an interstate railroad. If, as we have seen, a state cannot in any event interfere with or burden interstate commerce *unnecessarily*, certainly it will not be permitted to pursue a course the effect of which will be absolutely to destroy a necessary facility of such commerce, *if the same end may as well be accomplished without such result.*

From the pleadings it appears that all that was asked with reference to defendant's present bridge was the elevation of its superstructure to a certain height. This, then, must be taken as the measure of the necessities of the situation from plaintiff's own viewpoint. The court's order in the case, however, went further, commanding defendant "to forthwith remove from the channel of the Kansas river all obstructions of every kind and character" where its line crosses the stream, and "to clear such channel to a height of 340.26 above the Saint Louis Directrix." (Record, p. 16.)

Since the bridge could not stand with the bases of all its supporting piers for a distance of 734 feet (the width of the channel established at this point) resting in the air 340 feet from the ground, the order of the court absolutely prohibits the further maintenance of the present bridge at any eleva-

tion. Such a requirement is not pretended to be necessitated by the exigencies of the situation from the standpoint of flood protection, but is admittedly because of the lack of power in the court to enforce the order of plaintiff as prayed.

Again, while this order was entered with the presumption that the bridge would, in fact, be elevated or rebuilt (Record, p. 25), yet even if defendant's bridge could possibly be elevated or rebuilt under the terms of the court's order, this would have to be at such an elevation as would preclude its further use by defendant, for the reasons stated in the answer. The tracks at either end would be left more than six feet below the level of the bridge, with no power in defendant to elevate them. This result, too, is equally unnecessary.

As shown by the discussion in the court's opinion (Record, p. 23), defendant pointed out in its brief that by a proper procedure, in which Kansas City, Kansas, and all others interested were made parties, this result could be obviated. No objection was made by the court as to the possibility or efficacy of such a procedure, and the precedents cited by defendant in support thereof were not challenged.

The decision of the court thus amounts to a holding that it offers no valid defense against plaintiff's demand to show that it is sought to be enforced in a way which will absolutely destroy a necessary facility of interstate commerce, when it could just as satisfactorily be carried out without any substantial interference with such commerce.

(c) Even if it were admitted that a reasonable necessity existed for the elevation of defendant's bridge to the height specified, still the action of plaintiff herein and the decision of the court upholding it would deprive defendant of its property *unnecessarily*, and consequently without due process of law.

By the same authority under which its order was directed to defendant in this case, plaintiff could have required the necessary action on the part of the city and other property owners involved to enable defendant to comply with its demand. De-

fendant's answer alleged that plaintiff, in attempting to enforce its order without having thus first made compliance therewith by defendant possible, was seeking to deprive it of its property without due process of law, since the enforcement of such order would necessarily result in its loss of the use of the bridge.

The opinion of the court admits in effect that defendant has no authority to *compel* the assent of the city and other parties interested, but bases its decision upon the presumption that defendant, if it desires, may secure such necessary action on their part by *persuasion*, since such parties would hardly "put themselves in an attitude of hostility to the orders of this court or to the welfare of the people comprising the drainage district." It is submitted that to make the further enjoyment of its property depend upon such a mere presumed mental attitude of others when the power was in plaintiff to secure its further use to defendant, deprives defendant of its property without due process of law. *Louisville, etc., R. Co.* v. *Stock Yards Co.*, 212 U. S. 132, 144.

It is no answer to this contention to say that the court's order as finally entered did not require the raising of the bridge and, therefore, will not necessitate the elevation of the approaches across the city streets. If the court does not indirectly order the raising of the bridge, then its order simply amounts to a direction to defendant to destroy the bridge entirely, removing all piers and other parts of it. This total destruction of the bridge when the extreme necessity of the case would require only its elevation would still more obviously deprive defendant of its property without due process of law.

Without extending our argument further, we submit that the judgment of the Kansas court herein, based upon a decision that the demand of plaintiff may be enforced as a valid exercise of the police power, although it is based upon no reasonable necessity and is arbitrary and unreasonable in its requirements, and even though it absolutely and *unnecessarily* prohibits defendant from continuing the use of this portion of its line in

interstate commerce, violates fundamental rights secured to defendant by the Constitution and laws of the United States and deprives it of its property without due process of law.

We respectfully submit that the decision of the Supreme Court of Kansas herein should be reversed.

SAMUEL W. MOORE,
SAMUEL W. SAWYER,
JAMES M. SOUBY,
Attorneys for Plaintiff in Error.

FILED.
OCT 12 1912
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT

OF THE

UNITED STATES

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Plaintiff in Error.

vs.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY,
Defendant in Error.

No. 313

MOTION TO DISMISS, AFFIRM OR ADVANCE.

L. W. KEPLINGER,
C. W. TRICKETT,
For Defendant in Error.

The Press Print, Kansas City, Kansas

IN THE

SUPREME COURT

OF THE

UNITED STATES

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Plaintiff in Error

vs.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY,
Defendant in Error.

No. **734**

MOTION TO DISMISS, AFFIRM OR ADVANCE.

Defendant in error, The Kaw Valley Drainage District of Wyandotte County, moves the court:

First. To dismiss said cause for the reason that no Federal question is involved, all such questions having been repeatedly determined by this court adverse to

the claims made by plaintiff in error; or, if said motion be denied,

Second. To affirm the judgment of the trial court, for the reason that the writ of error was procured for delay, only, and the questions upon which the decision of the court depend are so frivolous as not to require further argument; or, in the event that both said motions be denied,

Third. To transfer said cause to the summary docket as provided in paragraph five, rule six.

L. W. KEPLINGER,
C. W. TRICKETT,
Attorneys and Solicitors for Defendant in Error.

ARGUMENT IN SUPPORT OF MOTION.

This is an action for mandamus, brought in the Supreme Court of Kansas, by the defendant in error.

The alternative writ alleges that the defendant in error is a drainage district, organized under Chapter 215, Session Laws of 1905, of Kansas; that the Federal government established harbor lines along the river, which lines coincide substantially with those established by the plaintiff for a levee; that by statute the defendant in error is given authority to determine the height of the superstructure of all bridges crossing the river within the district, and to compel the raising of bridges accordingly; that the defendant owns a bridge across the river within said district; that on or about July 15, 1911, it was notified to raise its bridge, superstructure, abutments, piers, piling and wreckage, but that it has failed, neglected and refused so to do.

The defendant answers that it is a railway corporation, and citizen of Missouri, engaged in interstate commerce, its business being that of a switching company, moving cars received from other railroads, handling shipments of goods received from states other than Kansas, such railroads having no tracks connected with the industries to which such goods are assigned, and transferring cars loaded with such shipments from Kansas City, Missouri, to other railways in Kansas and placing such cars for unloading at the various industries along the line of the defendant's road in Kansas, and taking such cars there loaded and transporting them to Kansas City, Missouri; that its tracks extend from the State of Missouri to and into Wyandotte County, and are laid across the bridge in question, the defendant having no other connection than its tracks across such bridge; that if such connection is destroyed or its use rendered unavailable, the line will be separated and its business as an interstate carrier destroyed, and the business of a large number of industries in Kansas greatly injured and in some cases destroyed; that if the bridge is raised as prayed for the defendant's business will be interrupted, its trains cannot be transported across the river, and its line of road will be cut and all its interstate business effectually destroyed; that the present height of its tracks upon the bridge is such that any additional elevation will preclude the use of the bridge for trains except by the construction of another approach at either end several feet above the surface of the defendant's tracks; that such approaches extend across various public streets in Kansas City, Kansas, not under the control of the defendant; that the defendant has no right, power or authority to raise its tracks upon such streets unless their grade is raised by order of the city; that a large amount

of private property abutting upon such streets would be seriously and permanently damaged by the change of grade, and that the plaintiff has taken no steps to ascertain such damages or compensate the owners therefor; that the city refuses to change the grade; that the defendant's tracks on the east side of the bridge are intersected by the tracks of three other railroad companies, and if the bridge is raised as desired such tracks would be cut in two and rendered useless unless also raised by their owners, which such owners refuse to do, and that the plaintiff has made no arrangements to have the same done; that a compliance with the demand of the plaintiff would cost more than $30,000.00, and the destruction of the bridge for railway purposes would injure the defendant many hundred thousands of dollars; that the enforcement of the plaintiff's demand would deprive the defendant of its property without due process of law and deny it the equal protection of the law, and operate as a direct interference with and a prohibition of interstate commerce, as the defendant carries over its lines interstate freight in carload lots, and that the defendant has made application to the chief of engineers and secretary of war for approval of plans for rebuilding its bridge, which application is pending, and that such change cannot be made without the consent of such officers. Except as specifically admitted, the answer denies all allegations of the alternative writ.

The plaintiff withdrew its reply and moved for judgment on the pleadings.

The defendant in its answer claims that to comply with the order applied for will destroy defendant's railway, compel it to violate its duties as a carrier of interstate commerce, abrogate its contracts with the industries which it serves, and all without due compensation

being made to this defendant or any adequate protection to the business interests threatened; also, that the enforcement of the demands of the plaintiff will be to deprive the defendant of its property without due process of law, and deny to it the equal protection of the laws, contrary to the provisions of Section One of Article Fourteen of the Amendments to the Constitution of the United States, and will operate as a direct interference with the interstate commerce, and a prohibition of interstate commerce, in contravention of the provisions of Section Eight of Article Seven of the Constitution of the United States.

The answer further alleged that plans for the modification of the bridge as demanded had never been submitted to or approved by the Secretary of War, and that for that reason the modification as demanded would be unlawful.

Upon motion for judgment upon the pleadings, a mandatory order was issued, as prayed for.

While other questions were, or possibly might have been, raised in the court below, the sole question to be considered by this court is whether, by reason of the facts alleged in defendant's answer, the awarding of the writ was in violation of any rights which the defendant had under the Federal Statute or Constitution, as claimed.

That the state has the right to compel the removal of obstructions in the bed of navigable streams which lie wholly within the state, is no longer an open question.

Northshore Boom Company v. *Necomen Boom Company*, 212 U. S. 412; 29 S. C. R. 355.

Montgomery v. *Portland*, 190 U. S. 89; 23 S. C. R. 735.

Cummings v. *Chicago*, 188 U. S. 410.

That the defendant itself must bear the expense of making changes required by the state, see:

C. B. & Q. R. R. Co. v. *Chicago*, 166 U. S. 226, paragraph 8.

Northern Pacific Ry. Co. v. *Duluth*, 208 U. S. 583.

"The expense of constructing a railway bridge over a highway made necessary by the action of the municipality in opening such highway through the railway company's embankment, may be cast upon the railway company without denying the due process of law guaranteed by the Federal Constitution which requires that compensation be made where private property is taken for public use."

Cincinnati, etc., Ry. Co. v. *City of Connersville*, 31 S. C. R. 93; 218 S. C. R. 336.

See also, *Chicago, B. & Q. R. R. Co.* v. *Illinois, ex rel Grimwood*, 26 S. C. R. 342, which says:

"The imposition upon a railway company of the entire cost of removing and rebuilding a railway bridge and culvert made necessary by the proposed widening and deepening of the channel of a creek, by drainage commissioners acting under the authority of the Illinois Drainage Act, does not amount to a taking of private property for public use which requires compensation in order to afford the due process of law guaranteed by the Federal Constitution."

"It is the settled rule of this court that the interdiction of statutes impairing the obligations of contracts, does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power in its various ramifications is known as the police power, is an exercise of

the sovereign right of the government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals."

Manigault v. *Springs*, 199 S. C. 480; 26 S. C. 130.

Also, *Northern Pac. Ry. Co.* v. *Duluth*, 208 U. S. 583.

From all of which it clearly appears that this court has already decided adversely to plaintiff in error as to every claim of Federal right asserted by it.

Wherefore, no Federal question is involved, and this court has no jurisdiction.

McGilvea et al v. *E. W. Ross et al*, 30 S. C. R. 27; 215 U. S. 95.

Mo. Pac. Ry. Co. v. *Castle*, 32 S. C. R. 606.

L. W. KEPLINGER,
C. W. TRICKETT,
For Defendant in Error.

To the Kansas City Southern Ry. Co., Plaintiff in Error:

You are hereby notified that on October 14, 1912, or as soon thereafter as the same can be heard, the defendant in error will present the foregoing motion for hearing.

L. W. KEPLINGER,
C. W. TRICKETT,
Solicitors for Defendant in Error.

SERVICE.

Service of copy of the above motion, argument and notice, is hereby acknowledged the 20th day of September, 1912.

O. L. MILLER,
Solicitor for Plaintiff in Error.

14

No. 313.

Office Supreme Court, U. S.
FILED
MAR 18 1914
JAMES D. MAHER
CLERK

In the Supreme Court of the United States

October Term, 1913.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF KANSAS.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

THOMAS A. POLLOCK,
Attorney for Defendant in Error.

SMITH-GRIEVES, LAW PRINTERS, KANSAS CITY, MO.

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In the Supreme Court of the United States

October Term, 1913.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF KANSAS.

No. 313.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

STATEMENT.

The overflows of the Kansas river occurring at Kansas City in 1903 and 1904 demonstrated the necessity for the improvement of the Kansas river and the regulation by the public of the construction and maintenance of bridges thereover.

The Kaw Valley Drainage District of Wyandotte County, Kansas, hereinafter referred to as the Drainage District, was incorporated in 1905 under the provisions of Chapter 215 of the Session Laws of Kansas for 1905, the same being sections 3000 to 3056 of the General Statutes of Kansas of 1909.

The Kaw Valley Drainage District is a public corporation invested by the state (subject to the jurisdiction of the United States as to navigation only) with the exclusive control of the portion of the Kansas river within its limits. Said district is expressly authorized to control and regulate the use and improvement of said river, including the construction and maintenance of bridges.

The Statutes Defining Powers of the Drainage District.

Section 3006, General Statutes of 1909, provides:

> **"3006. General Powers of District.** That each drainage district incorporated under the provisions of this act shall be a body politic and corporate and (subject to the superior jurisdiction of the United States over navigable waters) is hereby granted *exclusive control* of the beds, channels, banks and of all lands the title to which is vested in the state of Kansas, lying between the banks at high water mark, of all natural water courses within such district. And every drainage district so incorporated shall have power * * *.
>
> "*Second*, To sue and be sued in its corporate name * * *.
>
> "*Fourth, To take charge of and exercise exclusive control over all natural water courses within its territorial limits and to* so widen, deepen, establish, *regulate and maintain the channels thereof*, and to construct and maintain such levees along the banks thereof as may be deemed necessary or proper to prevent or restrain overflow or lessen the volume thereof or the injury deemed likely to

result therefrom; * * * *and may condemn and cause obstructions in such water courses to be removed.* * * *

"*Fifth*, To prescribe, regulate *and fix the height of the superstructures above the water*, the length of all spans and the location of the piers of *all bridges* across water courses situated in the district.

"*Sixth*, To construct levees across the rights-of-way, road-beds, tracks and lands of railroad companies and street railroad companies, and to condemn and appropriate by the exercise of the right of eminent domain in the manner hereinafter provided sufficient of such rights-of-way or other lands of any such railroad company or street railroad company as may be necessary for the purpose of constructing and maintaining a continuous levee of uniform height across the same.

"*Seventh*, To fix, regulate *and change the grade or elevation of all public highways, railroads* and street railroads at points where any levee may cross or intersect the same.

"*Eighth*, To require all railroad companies to elevate their tracks at all points where the same shall be intersected by any levee, so that such tracks will not interfere with the construction or maintenance of such levee as a continuous and effective work of uniform height to prevent the overflow of any natural water course.

"*Ninth*, To maintain in any court of competent jurisdiction suits to enforce the reasonable orders of its directors to enjoin the placing or maintenance in any natural water course of any unauthorized bridge, embankment, pier or other work or structure *constituting to any extent whatever an obstruction to the flow of the water*. To restrain all other wrongful or unauthorized encroachments upon or interference with the channel of such water course, and to have all obstructions wrongfully placed in the channel of natural water courses adjudged public nuisances and abated as such. * * *

"*Fifteenth*, To make all contracts and do all other acts in relation to the affairs of the district necessary to the proper exercise of its corporate legislative or adminis-

trative powers and to the accomplishment of the purpose of its organization.

"*Sixteenth,* To do all other acts that may be necessary to carry out and execute the general powers hereinbefore and hereinafter granted, although not hereinbefore specifically enumerated."

"3037. That if it shall be determined by the board of directors of any drainage district that it is necessary to construct any levee across the right-of-way, road-bed or tracks of any railroad or street railroad company or across any street or highway occupied by such tracks and it shall be necessary to raise or elevate such tracks in order to make such levee continuous and of uniform height, such board of directors shall make an order requiring such railroad or street railroad company to raise or elevate its tracks accordingly, specifying in such order the height to which such tracks shall be so raised or elevated and fixing a reasonable time within which it shall be done, and shall forthwith serve a copy of said order upon such company by delivering the same to any officer, agent or employee of such company found within the district, and it shall thereupon become and be the duty of such company to raise or elevate its tracks to conform to the requirements of such order; and upon failure of any such company to perform such duty within the time so fixed, the board of directors shall be entitled to a writ of mandamus to compel the performance of such duty and may bring and maintain a suit in any court of competent jurisdiction to obtain such writ and remedy."

Chapter 172 of the Laws of Kansas, Session of 1911, amendatory of and supplemental to Chapter 215 of the Laws of 1905, provides that, *when harbor lines have been established by Federal authority along navigable streams running through drainage districts,* that all lands lying between such harbor lines together with a strip forty feet wide on the land side of

and contiguous thereto shall be deemed to be necessary for the protection of the health, life and property of the people of the district, and appropriated for such use. Said act provides for the issuing by the governor of the state of a proclamation declaring the appropriation of a strip of land forty feet wide on the land side of and contiguous to such harbor lines; *and such a proclamation was issued as to the Kaw Valley Drainage District by the governor of the state of Kansas on February 3, 1911.*

Section 7 of said Chapter 172 provides:

> "Section 7. That any railroad or railway company having a right-of-way crossing any of the land so appropriated shall not be deprived of an easement for the use of such right-of-way but shall be permitted to retain the right it now has for the purpose of crossing or running along, upon or over such levee; *provided, however, that such use and occupancy shall not interfere with the widening* of such stream and shall not become an obstruction to the flow of the water therein and shall not interfere with the height or otherwise impair the usefulness of the levees to be constructed for the purpose of preventing overflow."

The Commencement of This Suit.

On February 9, 1912, the Drainage District filed its motion and affidavit in the Supreme Court of Kansas for a writ of mandamus against the Kansas City Southern Railway Company, hereinafter referred to as "the Railway Company," to compel said company to raise its bridge at Ohio avenue in Kansas City, Kansas, in said Drainage District, so that the lowest point of the superstructure would be in elevation 340.26 feet above the St. Louis Directrix, *and to remove "the old bridge, superstructure, abutments, piers, piling and wreckage."*

An alternative writ of mandamus was issued by the court, which writ, omitting the caption and formal portions thereof, is as follows:

Alternative Writ of Mandamus.

1. Comes now the plaintiff and files its motion and affidavit for a writ of mandamus, and alleges and shows to the court:

2. That the plaintiff, the Kaw Valley Drainage District of Wyandotte County, Kansas, is a public corporation, duly organized and existing under and by virtue of Chapter 215 of the Session Laws of 1905 of the state of Kansas.

3. That the defendant, the Kansas City Southern Railway Company, is a corporation duly organized and existing according to law.

4. That the Kansas river flows through the Kaw Valley Drainage District and is a navigable stream; that said stream overflowed its banks in 1903 and a large part of the city of Kansas City, Kansas, was flooded and millions of dollars' worth of property lost by reason thereof.

5. That the Federal Government established harbor lines along said river, which harbor lines coincide substantially with the lines established by the plaintiff herein for a levee along the banks of said stream.

6. That under and by virtue of the statutes of the state of Kansas, the plaintiff herein was given the authority to determine the height of the lowest point of the superstructure of all bridges across the said Kansas river within said district, and further empowered by mandamus to compel the raising of bridges in accordance therewith.

7. That the defendant herein owns a bridge across the Kansas river within the Drainage District, which is usually termed "the Ohio bridge."

8. That heretofore and by virtue of the power in it vested, the plaintiff on or about the 15th day of July, 1911, notified the defendant to raise its said bridge 6.5 feet or to the required height of 340.26 feet above St. Louis Directrix, *and to remove the old bridge superstructure, abutments, piers, piling and wreckage.* That the said defendant has failed, neglected and refused so to do.

9. Wherefore, plaintiff prays a writ of mandamus to the defendant requiring it to commence at once and proceed as rapidly as possible with the raising of its said bridge, so that the lowest point of superstructure will be 340.26 feet above St. Louis Directrix; and that it remove the old bridge superstructure, abutments, piers, piling and wreckage.

10. That the raising of said bridge and the removing of said obstructions is absolutely necessary in order to prevent overflow of the Kansas river by reason of the fact that at the present elevation said bridge and said obstructions obstruct the flow of water and cause the same to overflow the banks of said stream and to flood the inhabitants contiguous thereto. And for such other and proper relief as to the court may seem right and proper.

The concluding portion of the writ is as follows:

11. *Now, Therefore,* we do command you that upon receipt of this writ, that you raise and elevate your bridge, known as "the Ohio Avenue bridge" over the Kansas river, 6.5 feet, or so that the lowest point of superstructure will be 340.26 feet above St. Louis Directrix; and that you commence said work at once and proceed with the same as rapidly as possible

until completed, or that you appear before the Supreme Court of Kansas at the State Capitol in Topeka, Kansas, on the 20th day of February, 1912, at two o'clock p. m. of said day, and show cause by answer filed herein why you should not do so. And have you then and there this writ with your return thereon, showing that you have complied or will not comply with the contents hereof, or the reasons why you have not or will not do so.

The hearing upon the writ and answer is hereby set for the 20th day of February, 1912.

Return and Answer of the Railway Company to Alternative Writ.

The return and answer of the Railway Company to the alternative writ, omitting the caption, signatures, verification and indorsements and inserting the amendments made to said answer at their proper place therein, and numbering the paragraphs, is as follows:

Return and Answer of the Defendant to the Alternative Writ.

Now comes the above named defendant and for its return and answer to the alternative writ and petition herein says:

1. That said defendant denies each and every allegation and averment in said writ and petition contained and set out not hereinafter specifically admitted.

2. Defendant admits that the plaintiff is a public corporation organized under Chapter 215 of the Laws of 1905 of the state of Kansas.

3. That the defendant is a railway corporation duly organized and existing according to law.

4. That the Kansas river flows through the Kaw Valley Drainage District.

5. That the defendant herein owns a bridge across the Kansas river within the Drainage District, which is usually termed "the Ohio bridge."

6. Defendant alleges that it is a railway corporation duly organized under the laws of the state of Missouri, and is a resident and citizen of said state of Missouri and not a resident or citizen of the state of Kansas, and as such railway corporation is now and was at the commencement of this action engaged in the business of transporting cars loaded with freight of all kinds in transit from the state of Missouri and from states other than Kansas to and into Wyandotte county and state of Kansas, and from Wyandotte county in the state of Kansas to the state of Missouri and to states other than the state of Kansas.

7. That the defendant's railway tracks extend from Jackson county, state of Missouri, into and through Wyandotte county and state of Kansas. That its business is that of a switching company in addition to its interstate business as a common carrier of freight and passengers, and its main line of railroad crosses over said bridge and defendant carries thereon and thereover interstate freight, both in carload and less than carload lots, in the transaction of which business said defendant receives from other railroads handling shipments of goods from states other than Kansas, said railroads having no tracks connected with the industries to which said goods are consigned, and transferring cars loaded with such shipments from Kansas City in the state of Missouri to other railways in Kansas, and

placing such cars to be unloaded in Kansas at the various industries along the line of defendant's road in Kansas, and in taking cars loaded at such Kansas industries with goods to be transported to states other than Kansas and delivering such cars in Kansas City, Missouri, to various railroads for transportation to many different states, all of which business is interstate commerce and governed by various acts of the Congress of the United States and subject to the rules and regulations of the Interstate Commerce Commission of the United States.

8. That the defendant's railway tracks situated in the state of Missouri extend to and into Wyandotte county, Kansas, and are connected by means of tracks laid upon and across the bridge mentioned in the alternative writ herein, and usually called the Ohio bridge, and said defendant has no connection between its railway tracks in Missouri and its railway tracks in Kansas other than those across said Ohio bridge, *and if* such connection is destroyed or the use of its said tracks across said bridge is rendered unavailable, said defendant's railway line will be severed and its business as an interstate carrier destroyed, and the business of large numbers of industries in Kansas served by this defendant will be greatly injured and in some cases destroyed.

9. That defendant's tracks on the east side of said bridge are intersected by the tracks of the Missouri Pacific Railway Company, St. Louis & San Francisco Railroad Company and Chicago Great Western Railroad Company; *that if* said bridge is raised, as desired by the plaintiff, and the defendant should attempt to raise its tracks to conform to said bridge so raised the tracks of said other lines of railway intersecting defendant's tracks, would be cut in two and rendered useless for service unless the tracks of said other railways should also be raised by their owners; *that the plaintiff has not arranged* by

voluntary agreement with the owners of said other lines of railway to have said tracks raised, or taken any action whatsoever toward having them raised, and that the owners thereof refuse to raise the same.

10. Defendant further says that the purpose of the writ in this case is to require the defendant to raise the level of its said bridge and tracks across the Kansas river 6.5 feet above their present level, *and, if* this is done, this defendant's said business will be interrupted, its trains cannot be transported across the Kansas river since it will be unable to either go on to or off of said bridge with its engines or cars, and its line of road will be cut and all its interstate business effectually destroyed.

11. That the present height of the defendant's tracks upon said bridge is such that any additional elevation thereof will preclude the use of said bridge for trains, *and the only manner in which such bridge can thereafter become available for use will be by the construction of long approaches at either end thereof elevated several feet above the present surface of defendant's tracks;* but defendant says that the approaches to said bridge upon either end rest upon and extend across various public streets in Kansas City, Kansas, *which streets are not under the control of this defendant, but under the exclusive control of the city of Kansas.*

12. That there is a large amount of private property abutting upon said streets, and improvements erected thereon; that said private property and the improvements thereon would be seriously and permanently damaged by the changing of the grade of said streets which would be made necessary by the elevation of the bridge, *and the plaintiff* has taken no steps to ascertain the damages to said property or to compensate the owners of said property therefor.

13. That said defendant has no right, power, or authority to raise the grade of its tracks or the approaches to said railway bridge, *unless* the grades of the streets upon which said approaches rest are by the order of said Kansas City, Kansas, raised to conform to the grades necessary to the use of said bridge for railroad purposes.

14. That the city of Kansas City, Kansas, *has not raised the grades* of any of its said streets upon which said approaches rest, and has refused to make such changes in the grades of said streets as will necessarily be required in the operation of trains by the defendant *if* the height or elevation of its said railway bridge is increased in accord with the demands of the plaintiff herein, and in fact said city has failed and refused and still does refuse to make any change whatever in the grades of its said streets.

15. *It therefore results* that this defendant while at all times ready and willing to comply with any lawful or reasonable request or order of public bodies within the territories wherein it operates, ought not to be required to comply *with the demand of the plaintiff as set forth* in the petition and writ herein, *since* such compliance will destroy defendant's railway, compel it to violate its duties as a carrier of interstate commerce, abrogate its contracts with the industries which it serves, and all without due compensation being made to this defendant or any adequate protection to the business interests threatened.

16. That such demand of the plaintiff as set forth in the petition and writ herein, is *unreasonable, illegal, arbitrary,* and beyond the power of said plaintiff to make, and defendant's compliance therewith would require either a total destruction of its business as a carrier of commerce *or* necessitate wrongful and illegal acts of the defendant upon the public streets of

Kansas City, Kansas, and in violation of the Fourteenth Amendment to the Constitution of the United States.

17. Defendant further says that a compliance with the demands of the plaintiff in the reconstruction of its said bridge and the approaches thereto, *if permitted*, will cost this defendant a sum in excess of thirty thousand dollars, and the destruction of its bridge for railway purposes will injure and damage this plaintiff many hundred thousand dollars.

18. Plaintiff herein has no power or authority under the statutes of the state of Kansas, or otherwise, to require the defendant's bridge, which is now built and in use, to be raised.

19. That the defendant has made application to the Chief of Engineers and Secretary of War of the United States for approval of plans *for rebuilding the bridge in question* and such application is now pending and by reason thereof said bridge cannot be raised without permission of said Federal officials.

20. That the enforcement of the demands of the plaintiff will be to deprive the defendant of its property without due process of law, and to deny to it the equal protection of the laws contrary to the provisions of Section 1 of Article 14 of the Amendments to the Constitution of the United States, and will operate as a direct interference with interstate commerce and a prohibition of interstate commerce, in contravention of the provisions of Section 8, of Article 1, of the Constitution of the United States.

On March 23, 1912, a stipulation was filed, providing that the case should be set down for hearing on April 5, 1912.

On April 5, 1912, the Drainage District moved for judgment upon the pleadings. The journal entry of submission

(paragraph 34, Record) shows that the cause was heard on the pleadings, and that this suit, together with No. 314, *Kansas City Terminal Railway Company, Plaintiff in Error,* v. *Kaw Valley Drainage District,* involving similar questions, was submitted upon the motions for judgment on the pleadings, on briefs for both parties and after oral argument by counsel, and taken under advisement by the Court.

The judgment commanded the defendants in said suits to forthwith remove from the channel of the Kansas river *all obstructions* of every kind and character where their lines cross the stream, and command the Kansas City Terminal Railway Company to clear such channel to a height of 342.773 feet above the St. Louis Directrix, *and commanded the Kansas City Southern Railway Company to clear such channel to a height of 340.26 feet above the St. Louis Directrix.*

The cases were argued and considered together in the Supreme Court of Kansas and one opinion written for both suits. The same is set forth at length, pages 16 to 25 of the Transcript of Record.

BRIEF OF ARGUMENT.

I.

This Court has no jurisdiction because there is no Federal question in this case.

1. The record does not show that any right of the company protected by the Federal Constitution was put in issue or decided. The Company claims that its answer to the alternative writ shows that a Federal question was involved in this suit. The District contends that in order for an answer to raise a Federal question, it must state facts presenting such question; that a mere conclusion of law inserted in the answer, to the effect that a certain order or demand of the District constitutes a taking of its property for public use without compensation, or without due process of law, or denies to it the equal protection of the laws, without a statement of facts so showing, is insufficient. That the alleged Federal questions appear from an examination of the pleadings to be fictitious.

2. The decision of the Supreme Court of Kansas is in substance that the answer and return of the Railway Company set forth no defense to the alternative writ, and that the pleadings before that court invested it with jurisdiction to issue the peremptory writ set forth in the record. The question whether the Supreme Court of Kansas erred in holding that it could rightfully decide upon the pleadings, that the peremptory writ shown by the record should be allowed, is a question of pleading and practice to be conclusively determined according to the general principles of the laws of Kansas applicable thereto.

II.

The proceedings of the Supreme Court of Kansas, upon which judgment was rendered in this case, do not operate as a denial to the defendant of the equal protection of the laws or as a deprivation of its property without due process of law; nor do said proceedings constitute a taking of the Company's property for public use.

1. The argument of the Company on this proposition is not supported by the record. It assumes, contrary to the record, that there were issues of fact as to the truth of material allegations of the alternative writ.

2. It is a common and permissible practice where an answer does not allege any defense, to render judgment for the plaintiff on the pleadings. The Railway Company had notice and was fully heard before the rendition of the judgment. Whether or not the answer raised an issue of fact necessary to be supported by evidence to entitle the Drainage District to judgment, or stated any valid defense, and whether the pleadings before the court were sufficiently broad to invest that court with jurisdiction to issue the peremptory writ set forth in the record, were questions within the jurisdiction of the Supreme Court of Kansas to decide, dependent upon general principles of law, and not involving any provision of the Constitution of the United States.

III.

Neither the order of the Drainage District, nor the judgment of the Supreme Court of Kansas, constitute a taking of the Company's property, or denies to it the equal protection of the law or deprives it of its property without due process of law.

1. The alleged interference with interstate commerce, the alleged refusal of Kansas City to change the grade of certain streets, the alleged application of the Company to the War Department for leave to rebuild its bridge, assuming (what is not admitted) that the same were well plead, are in law insufficient defenses.

2. The answer admits all the allegations of the alternative writ, including the allegation that the district made and served upon the Railway Company "as set forth in its petition" for the writ, an order to raise the bridge six and one-half feet, and to remove the old bridge, superstructure, abutments, piers, piling and wreckage, and that the Company refuses so to do.

3. The answer contains no allegation raising an issue as to the reasonableness of the requirement of the District that the bridge be elevated, so that the lowest point of the superstructure be 340.26 feet above the St. Louis Directrix, or as to the reasonableness of the demand of the District for the clearing of the channel to the elevation of 340.26 feet.

4. The power of the directors of the Drainage District to fix the elevation of the bridge and to condemn old bridges or parts thereof as obstructions, is legislative in its nature and its exercise not subject to review by the courts. In any event, this is true when the question of the reasonableness of the order is not challenged in the answer by appropriate allegations of fact.

5. It is the duty of the Company to elevate its bridge and to clear the channel, as required by the Drainage District, at its own expense, and the judgment of the Supreme Court of Kansas requiring it so to do does not deprive the Company of its property without due process of law, nor constitute a taking of its property for public use, nor deny to the Company the equal protection of the laws. The loss incident to the enforcement of the police power of the state in such a case is *damnum absque injuria*, and does not constitute a taking of the Railroad's property for public use.

6. The Company went to trial on an issue of law. It has not asked leave to amend its answer. It submitted its rights for final judgment on an issue of law presented by a motion for a peremptory writ.

IV.

The judgment that the Railway Company clear the channel to the elevation required is within the scope of the relief demanded by the alternative writ of mandamus. The Supreme Court of Kansas had, by virtue of the pleadings, jurisdiction over the bridge and the river, and its peremptory writ is not erroneous or void because of want of jurisdiction to order the channel of the river to be cleared to an elevation of 340.26 feet.

BRIEF AND ARGUMENT.

I.

This Court has no jurisdiction. There is no federal question in this case.

The alleged Federal questions are fictitious.

New Orleans v. *New Orleans Water Works Co.*, 142 U. S. 79, 12 Sup. Ct. Rep. 142.

The Kansas Supreme Court held on a motion for a peremptory writ that the answer stated no defense.

In *Iowa Cent. Ry. Co.* v. *State of Iowa*, 160 U. S. 394, 16 Sup. Ct. Rep. 344, this Court decided:

> "The question whether the highest state court erred in holding that it could rightfully determine, from the statements in the pleadings filed by both parties to a controversy pending before it, that the averments of an answer, set forth no defense to the claim of the plaintiff, is not reviewable on appeal to the Supreme Court."

Justice White, delivering the opinion of this Court, at page 345, says:

> "It is manifest that it was never contemplated by the framers of the Constitution that this court should sit in review, as an appellate court, of such a question as that presented by the record in the case at bar, viz.: whether or not the highest court of a state erred in holding that it could rightfully determine, from the statements in the

pleadings filed by both parties to a controversy pending before it, that the averments of an answer set forth no defense to the claim of the plaintiff."

II.

The proceedings of the Supreme Court of Kansas, upon which judgment was rendered in this case, do not operate as a denial of the equal protection of the laws or as a deprivation of its property without due process of law; nor do said proceedings constitute a taking of the Company's property for public use.

It appears from the record that the argument of the Company on this proposition is based upon a false hypothesis. The Company assumes:

First, That by its answer it put in issue the reasonableness of the District's order to raise the bridge and clear the channel of obstructions to an elevation of 340.26 feet.

Second, That the Supreme Court of Kansas ignored such an issue, and without requiring any evidence from the District or affording the Company an opportunity to offer evidence upon such an issue, decided the issue against it in effect by awarding a peremptory writ requiring it to clear the channel to an elevation of 340.26 feet.

The record does not show any such issue was raised by the pleadings; therefore, no evidence was proper or admissible thereon. The record shows that the District moved for a peremptory writ on the pleadings; that an issue of law was thus presented between the parties; that it was decided against the Company; that it asked for a rehearing thereof; that it made no application for leave to amend its answer and that a peremptory writ was ordered.

The Railway Company by its brief obscures the real questions involved. It assumes that various affirmative defenses are well plead in its answer, some of which are insufficiently plead, others practically not mentioned.

Some of the matters attempted to be set up would not constitute any valid defense no matter how fully stated. Other matters argued as a defense, if properly plead, might have raised an issue of fact and thus required the overruling of the motion for a peremptory writ.

The Supreme Court of Kansas properly ignored in its decision and opinion any reference to the reasonableness of the order of the Drainage District requiring the bridge to be raised six and one-half feet. The answer does not present any such issue or defense. The Company does not allege that the bridge is high enough; that three feet instead of six and one-half would be a sufficient raise; that the channel was of sufficient width and depth or capacity to carry off all floods which might reasonably be anticipated; that the height of the bridge was such that it did not constitute any interference with the free navigation of the river, or any facts raising any issue as to the reasonableness of the order requiring it to raise its bridge six and one-half feet. Nor does the answer allege any fact raising an issue of fact as to the reasonableness of the demand of the District for the removal of "the old bridge superstructure, the old piers, abutments, piling and wreckage" about the same. If the Company had alleged that removal of the present bridge was unnecessary; *that it was willing to repair or reconstruct it;* that the superstructure could be raised; *that piers are necessary on account of width of river;* that the present piers and abutments could be built up six and one-half feet, that the present piers and abutments are constructed of good material, of proper dimensions, rightly located, and sufficient to carry the bridge and withstand floods if so repaired; that the river is not navigated sufficiently to require any raise of the

bridge to accommodate navigation or any other matters raising an issue of fact as to the reasonableness of the District's demand for the removal of the old bridge, the questions now presented for decision would be different. Such allegations might be held to raise issues of fact, and would be perhaps an excuse for the claims and arguments of the Company that its bridge is to be taken or destroyed without compensation or due process of law.

The Admissions by the Answer.

The answer admits all the material allegations of the writ. The Railway Company admits by its answer: (1) the corporate existence of the parties; (2) that the Kansas river flows through the Drainage District; (3) that it owns the bridge in controversy; (4) that the District demanded of it the elevation of its bridge and the removal of the old bridge, "as set forth in the petition," and that it refuses to comply.

The first three of the allegations above mentioned are admitted in express terms. The fourth is admitted both expressly *and by the legal effect of the answer.*

The defenses relied upon by the Company are inconsistent with a denial of the material allegations of the alternative writ. If no order or demand was made by the District for the elevation of the bridge or its removal, *then there is no foundation for the affirmative defenses* that the District's order is an interference with interstate commerce; that it would require the raising of the approaches to the bridge; that it would cost over $30,000 to raise such approaches; that the District has no power or authority to make such an order, and that the order is unreasonable and, therefore, void. The affirmative defenses set up in the answer are inconsistent with a denial that an order for the elevation and the removal of the bridge was made and notice thereof given to the Company. The answer

was necessarily one of confession and avoidance. *The Company by its answer confesses the truth of all the material allegations of the writ, but seeks to avoid compliance with its command by a statement of new matter as affirmative defenses.* The general denial with which the answer commences is in effect eliminated by an attempt to set up as affirmative defenses: (a) that the District's order is void because an unlawful regulation or interference with interstate commerce; (b) that the raising of the bridge to the elevation demanded would require the raising of the tracks leading to it; that those tracks extend across and along certain public streets of the city of Kansas City, and that said city refuses to change the grade of those streets; (c) that if the consent of the city to the elevation of those tracks was secured, the work of reconstructing them would cost the Railway Company over $30,000; (d) that plans for the rebuilding of the bridge have been submitted to the Chief of Engineers and Secretary of War of the United States for approval, and that the bridge cannot be raised without permission of said officials; (e) that the Drainage District has no power or authority to require the bridge to be raised.

Paragraphs 15, 16 and 17 of the Company's answer are as follows:

> "*It therefore results*, that this defendant while at all times ready and willing to comply with any lawful or reasonable request or order of public bodies within the territories wherein it operates, ought not to be required to comply *with the demand of the plaintiff as set forth* in the petition and writ herein, *since* such compliance will destroy defendant's railway, compel it to violate its duties as a carrier of interstate commerce, abrogate its contracts with the industries which its serves, and all without due compensation being made to this defendant or any adequate protection to the business interests threatened.
>
> "*That such demand of the plaintiff as set forth in the petition and writ herein, is unreasonable, illegal, arbitrary,*

and beyond the power of said plaintiff to make, and defendant's compliance therewith would require either a total destruction of its business as a carrier of commerce or necessitate wrongful and illegal acts of the defendant upon the public streets of Kansas City, Kansas, and in violation of the Fourteenth Amendment to the Constitution of the United States.

"Defendant further says, *that a compliance with the demands of the plaintiff* in the reconstruction of its said bridge and the approaches thereto, if permitted, will cost this defendant a sum in excess of thirty thousand dollars, *and the destruction of its bridge* for railway purposes will injure and damage this plaintiff many hundred thousand dollars."

The allegations quoted constitute an express admission by the company, *that the district has made an order for the elevation of its bridge and the clearing of the channel. Manifestly the legal effect* of the answer is to assert the making of the order and demand for the elevation of the bridge and the clearing of the channel, and refusal to comply on the part of the Company. Such a construction of the answer is the basis of the affirmative defenses attempted to be set up therein.

The Law as to Pleading and Practice in Answers in Mamdamus.

In the mandamus case of *Crans* v. *Francis*, 24 Kan. 754-755, Justice Brewer, delivering the opinion of the Supreme Court, said:

"The plaintiff files a motion to quash the answer. * * *

The entire nature of this proceeding is, as we have had occasion heretofore to notice, changed by statute. *State* v. *Jefferson Co.*, 11 Kan. *66. It is now in its form

very like an ordinary action. No other pleadings are allowed than the writ and answer. *These pleadings are to be construed, and to have the same effect as pleadings in a civil action; and the issues are to be tried, and further proceedings had, as in a civil action.* Code, Sec. 696. Under those rules, a motion to quash the answer is a challenge of the substance of such answer. It asks that as a whole it be rejected; in other words, it claims that, construed by the ordinary rules of pleading, it contains no defense. If sustained, it strikes out the entire pleading, and leaves the plaintiff's pleading admitted. It is not in the nature of a motion to make specific and definite, for such a motion implies a defense presented, though imperfectly pleaded; neither is it equivalent to a motion to compel defendant to elect, for such a motion implies the existence of two or more defenses. This motion denies any defense. It is like a motion to strike out the answer as containing no defense, or a motion for judgment over the answer, or a demurrer to the answer. It attacks the substance, and not the form, and says that no defense is presented. Strictly, then, if any defense appears in the answer, the motion must be overruled. * * *

The answer commences with a general denial. As there are many facts in and essential to plaintiff's petition which require proof, and are not admitted by a failure to deny under oath, this of itself is a sufficient answer, and compels the overruling of this motion, *unless the matters thereafter admitted in the answer of themselves show that plaintiff is entitled to the relief asked.*"

A Motion for Judgment on the Pleadings Proper Practice When the Answer Is Insufficient.

In 26 Cyc. 489, the author says:

"It is common practice for relator to move for a peremptory writ on the return, or on the papers equivalent to the return, instead of pleading or joining issue

on the return, or going to trial. Such a motion operates as a demurrer to the return or other defensive matter, so as to admit the truth of all matters sufficiently pleaded therein. But matter not well pleaded in the return or answer, such as conclusions of law, will not be taken as admitted."

In 13 Encyl. Pl. & Pr. 777, the rule is stated as follows:

"When the plaintiff's allegations are sufficient if true, and the pleadings filed by the respondent present no issue of fact and virtually amount to no answer, the proper practice is to direct the issue of a peremptory writ."

See also to same effect High's Extraordinary Legal Remedies, Sec. 477.

In the recent case of *Emporia* v. *Rly. Co.*, 88 Kan. 611, a mandamus suit, the plaintiff moved for and recovered final judgment on pleadings. In that case the answer of the railway contained a general denial and also alleged matters in avoidance, including a claim that it was being deprived of its property in violation of the Constitution of the United States.

In *Hutchison* v. *Myers*, 52 Kan. 290, in the second paragraph of the syllabus, the court decides:

"Where the answer of defendant admits the cause of action stated in plaintiff's petition, and its averments are insufficient to constitute a defense, the court may, upon motion of plaintiff, allow and enter judgment in his favor upon the pleadings."

In the opinion, at page 295, Chief Justice Johnston, speaking for the court, says:

"The motion for judgment on the pleadings was equivalent to a demurrer to Hutchison's answer, and is a common and permissible practice. If the averments of

the petition were sufficient, and the answer did not allege a defense, and no amendment was asked for or allowed, plaintiff was certainly entitled to a judgment."

Confession and Avoidance.

In 26 Cyc. 452-489, the rules of pleading in returns to alternative writs of mandamus, p. 452, are stated as follows:

> "Instead of traversing the matters set forth in the alternative writ or petition, respondent may plead by way of confession and avoidance, and if he relies on new matter excusing non-performance of the commands of the writ, this must be set up in the return. *Great strictness of pleading is required in returns which set up matter of confession and avoidance.*
>
> Relator is entitled to the benefit of all admissions made by respondent in the return (p. 453).
>
> The return or answer must set out the facts relied on as an excuse for non-performance so that relator may traverse them. Accordingly it is insufficient if it states conclusions of law without alleging the facts on which they are based" (p. 454).

In High's Extraordinary Legal Remedies, Secs. 472, 473 and 474, the author states that where the answer is in its nature *a confession and avoidance* its allegations must be direct and positive and state the facts with precision and certainty.

In 13 Encyl. of Pl. & Pr. 725, the author says:

> "The respondent in mandamus may either deny or confess and avoid; that is, he may either deny the facts upon which the relator bases his claim to relief, or, admitting those facts to be true, may set up other facts which show that the defendant is under no obligation to perform the commands of the writ. *Every answer must do one or the other of these things.*

When the respondent sets up facts in confession and avoidance, those facts must be stated with precision and certainty, according to the rules of pleading required in the answer.

It is not permissible to set up inconsistent or repugnant defenses."

In the case of *Woodruff* v. *New York & N. E. R. Co.*, 20 At. 17, is illustrative of the law. The sufficiency of the answer of the railway company in a mandamus suit to compel it to improve a street crossing was involved. The court in its opinion (at page 20) says:

"The return of an alternative writ is demurrable unless it shows a right to refuse obedience to it; *and it must state the facts which justify such refusal clearly, specifically, and with such sufficient certainty that the court can see at once that such facts, if admitted or established, do furnish a legal alternative for obedience to the writ.* High Extr. Rem., Secs. 449-460; *State* v. *Lean*, 9 Wis. 279; *Springfield* v. *Commissioners*, 10 Pick. 59, Mos. Mand. 210; *Bank of Albany* v. *Commissioners*, 10 Wend. 25.

"There is in the return before us no direct denial of the facts alleged in the alternative writ, and it is possible that such a denial, had it been made in the case, would not have withstood the test of a demurrer. It would deny in terms what the court would be bound to know judicially to be true, *i. e.*, the existence and the terms of the legislative resolutions; *while the order made by the commission, and the non-compliance therewith, are admitted, or made a part of the return itself.* We need not discuss this. A general denial puts in issue the existence of those facts, which if true, constitute a *prima facie* cause of action or ground of defense. *When these facts exist, but, by reason of some extraneous features or elements affecting them, they do not produce the otherwise necessary result, that element which destroys the prima*

facie legal effect of the facts is not put in issue by such a denial. It is new matter, and must be specially pleaded. And so, where a legal right to refuse obedience to a writ can be shown in no other way than by setting forth such extraneous features or elements, a return that omits them is clearly bad on demurrer."

In *C. K. & W. R. Co.* v. *Comm'rs of Chase County*, 49 Kan. 399, the court in the third paragraph of the syllabus decides:

"In a proceeding of mandamus, to compel the performance of a public duty, *no formal demand upon the defendants is necessary* where their course and conduct manifest a settled purpose not to perform the duty, and where it clearly appears that a formal demand would be useless and unavailing."

In *Northern Pac. R. Co.* v. *Washington*, 12 Sup. Ct. Rep. 283, at page 289, the court in its opinion says:

"The mandamus prayed for being founded on a suggestion that the defendant had distinctly manifested an intention not to perform a definite duty to the public, required of it by law, the petition was rightly presented in the name of the territory at the relation of its prosecuting attorney (*Attorney General* v. *Boston*, 123 Mass. 460, 479; Code Wash. T., Sec. 2171); *and no demand upon the defendant was necessary before applying for the writ.* (*Com.* v. *Commissioners*, 37 Pa. St. 237; *State* v. *Board*, 38 N. J. Law 259; *Mottu* v. *Primrose*, 23 Md. 482; *Attorney General* v. *Boston*, 123 Mass. 460, 477.)"

The Allegations of the Writ Not Admitted Immaterial.

The only allegations of the alternative writ not admitted to be true by the Railway Company are: that the Kansas river is a navigable stream; that it overflowed its banks in 1903;

that a large part of the city of Kansas City was flooded and millions of dollars' worth of property lost by reason thereof; that harbor lines were established by the United States, which lines coincide with those established by the Drainage District for a levee along the banks of the river, and that the plaintiff has authority to determine the elevation of bridges across the Kansas river and to compel the raising of bridges by mandamus in accordance with its orders. These are allegations of matters of fact and law of which the trial court, *and this Court as well*, will take judicial notice. Section 5724, Genl. Sts. of Kan. 1909, provides that, "neither presumptions of law nor matter of which judicial notice is taken need be stated in a pleading."

Senate Document No. 160, 58th Congress, Second Session, is a letter from the Secretary of War to the President of the Senate, transmitting therewith reports of a board of engineers on the establishment of harbor lines in Missouri and Kansas rivers at Kansas City and on the subject of obstructive bridges and flood conditions in the Kansas river at and near its mouth. This document was printed by order of the Senate. At page 4 the Kansas river is reported to be navigable and the establishment of harbor lines discussed. At pages 5 to 7 this document contains a report as to obstructive bridges over the Kansas river at Kansas City, Kansas, in which it is said:

> "The Kaw river, for a distance of 17,000 feet above its mouth, is in a condition that constitutes a dangerous menace to life and property on its banks. The channel has been encroached upon by riparian owners until its normal average width of about 850 feet (minimum 540 feet), as shown by the meander lines of 1856, is reduced to an average of about 590 feet, with a minimum in one place of 420 feet.
>
> "*Bridges have been built with more piers than are necessary.* The piers have not been carried down to rock, but have been founded on piles, the masonry work ex-

tending but a short distance below low water. To protect the foundations from scour, immense quantities of loose rock have been deposited around the piers until each pier is virtually an island of rock in the river. Between the piers the falsework piles used during construction have generally been cut off at or near low water and left in the stream.

Besides these obstructions caused by the bridges there have been built from time to time stone dikes extending into the stream from both banks. Other obstructions, the purpose and history of which cannot be determined, exist all along this part of the river.

The result is that the natural channel of the stream has been materially diminished, its bottom has been made so rigid that it will not yield to scour during high water, and its original capacity to carry off floods has probably been *reduced by one-half*."

As to the navigability of the river at Kansas City, at page 6 of this document, it is said:

"The Board submits the following data upon the status of this stream as a navigable waterway of the United States:

Steamboats have ascended the river as far as Fort Riley, Kan. This was before any artificial obstructions in the form of bridges or dams had been made.

The Government has twice required reports upon the feasibility of improvement works on the stream in the interests of navigation.

In 1898 the Government built certain works for the improvement of the river a short distance above the mouth, pursuant to Act of Congress of July 1, 1898, which provided that the sum of twenty thousand dollars, or so much thereof as may be necessary, shall be expended in widening and cleaning out the mouth of the Kaw river where it empties into the Missouri river at Kansas City.

Although navigation is almost entirely cut off by the artificial obstructions in the channel, there was until

recent years considerable traffic in sand within the limits of Kansas City, and if the channel were again opened there would be an active business in this line.

The Government has never exercised any supervision over bridges built across the Kaw river.

Congress has in one case granted authority to construct a bridge over the river. (Act of March 17, 1886.)

The Government has on different occasions caused obstructions to be removed from the stream within the limits of Kansas City, Kan., and its authority to do this has been acquiesced in without protest except in one case.

The navigable portion of the river lies wholly in the state of Kansas, the mouth being a few hundred feet above the point where the state line between Kansas and Missouri intersects the right bank of the Missouri river."

At pages 7 to 23 the report treats of flood conditions at and near the mouth of the Kansas river and estimates (p. 12) the loss from the flood of 1903 at from $20,000,000 to $30,000,000.

The attention of the Court is called to the annual report of the Chief of Engineers of the United States for 1910, page 1833. This report shows that on June 24, 1910, harbor lines were duly established by the Secretary of War of the United States for the Kansas river at and beyond the bridge in controversy, pursuant to a resolution of Congress of date February 16, 1909, authorizing the Secretary of War to fix and etsablish pier-head and bulk-head lines, either or both, in the Kansas river at Kansas City, Kansas, beyond which no piers, wharves, bulk-heads or other work shall be extended or deposits made, except under such regulations as shall be described from time to time by the Secretary of War.

This Court may also take judicial notice of the maps accompanying the said report, establishing harbor lines, on file in the office of the Chief of Engineers of the United States

in compliance with the resolution of Congress aforesaid, and indorsed as follows: "In compliance with public resolution of Congress February 16, 1909. Harbor lines for Kansas River at Kansas City, Kansas, mouth to Argentine wagon bridge. Kansas City, Mo., May 20, 1910, to accompany report of this date on public hearing January 25-27, 1910. Authorized by the Chief of Engineers, U. S. Army. Edward H. Schulz, Major Corps Engineers, U. S. A. War Department, Washington, D. C., June 24, 1910. Approved: Robert Shaw Oliver, Acting Secretary of War."

The public officers' report and map above mentioned show the establishment of harbor lines, the width of the channel, the location and number of piers and abutments of the bridge in controversy and the location with reference to the public streets of Kansas City, Kansas. From this map it appears that both of the abutments of the defendant's bridge are within the harbor lines, and that it is 185 feet from the west harbor line to the west abutment of the bridge.

The court is also requested to take judicial notice of Document No. 94 of the House of Representatives, 62nd Congress, First Session, printed by order of the Committee on Rivers and Harbors on July 19, 1911, which document contains a report of the survey of the Kansas river from its mouth to Argentine, Kansas, made pursuant to an Act of Congress of March 3, 1909.

At page 14 of that document, it is said:

> "The following are the correct data for bridges, including their modifications, to conform to the approved harbor lines and for a clear elevation equal to the flood height of 1903." (Here follows a tabulated statement as to the location, elevation, length, number of piers and cost of reconstructing bridges over the Kansas river in the Kaw Valley Drainage District.)

The report as to the defendant's bridge is as follows:

> "No. 4, Kansas City Southern. Approximate distance above mouth, 4,450 feet. Present lowest point of superstructure, 333.76 feet. Required lowest point of superstructure, 340.26 feet. Required additional height, 6.50 feet. Distance of the face of present abutment to harbor line, left bank, 185.8 feet; right bank, 7.9 feet. Approximate required additional length, 193.7 feet. Number of piers, 2. Approximate cost of *reconstruction*, $177,545."

The document last above cited also contains as a part thereof a map of the Kaw Valley Drainage District, purporting to have been made to accompany said report of December 9, 1910, by Edward H. Schulz, Major Corps of Engineers, U. S. A.

> "Maps and reports made by authority of law by public officers may be judicially noticed by an appellate court." (7 Ency. of Evidence 882.) *Bryan* v. *Forsyth*, 19 Howard 334; *Watkins* v. *Holman*, 16 Peters, page 35; *Gregg* v. *Forsyth*, 24 Howard 179; *U. S.* v. *Teschmaker*, 22 Howard 405.

In *Kirby* v. *Lewis*, 39 Fed. 67, the court decided:

> "The official report and correspondence of public officers of the state and the United States, relating to the swamp lands of the state, and published by authority of the Legislature, are public documents, *which the court has a right to consult, even if not made formal proof in the case.*"

See also, 17 A. & E. Ency. of L. 901; 9 A. & E. Ency. of L. 880.

An appellate court must take notice of everything which the court whose judgment it is reviewing, is bound to notice. *Tischner* v. *Rutledge*, 35 Wash. 285, 77 Pac. 388; *Smith* v. *City*, 27 Kan. 523.

An appellate court will not interfere with the trial court's action based upon its judicial knowledge, unless it has manifestly erred. *People* v. *Mayes*, 113 Cal. 618, 45 Pac. 860; 7 Ency. of E. 882-883.

The Supreme Court of Kansas takes judicial notice of the navigability of the Kansas river. *Wood* v. *Fowler*, 26 Kan. 682; *Hoyt* v. *Russell*, 117 U. S. 401.

The Supreme Court of Kansas refers to the reports, documents and maps above mentioned (copies of which are deposited with the clerk of this Court) in its opinion (pp. 44-45 Record.)

III.

Neither the order of the Drainage District nor the judgment of the Supreme Court of Kansas constitute a taking of the Company's property, or denies to it the equal protection of the law, or deprives it of its property without due process of law.

Neither the order or judgment constitutes any wrongful interference with interstate commerce or any business of the Company.

The order of the District requiring the Railway Company to raise its bridge six and one-half feet is not a regulation of commerce nor a wrongful intereference therewith. The Railway Company admits in its answer that it can raise its bridge and operate its trains thereover if the approaches leading thereto are also raised several feet. Its real contention is that it has no authority to raise the approaches to its bridge because of an alleged refusal of the city of Kansas City to make such changes in grades of streets as will be necessary when its bridge is elevated, as required by the order of the District.

The allegation that the city "has not raised the grades of any of its streets upon which the approaches rest, and has refused to make such changes in the grades of such streets as will necessarily be required in the operation of trains by the defendant if the elevation of its bridge is increased in accord with the demand of the plaintiff," is an admission that if the approaches are raised, the use of the bridge may be continued as heretofore. This objection on the part of the Company is an argumentative, conditional, contingent or conjectural conclusion on the part of the Company, and insufficient to excuse the Company from raising its bridge or clearing the channel of the river to a height of 340.26 feet.

The fact that the Railway Company is engaged in interstate commerce does not prevent the state acting, through its duly authorized agent, from enforcing its police powers for the protection of life and property, by requiring the bridge to be raised or wholly removed from the river. The state has a right to interfere with the maintenance of a dangerous bridge across a public highway, so far as is necessary for the public protection.

The allegations as to the refusal of the city to change the grades of the street are not a valid defense.

The Railway Company has not alleged any demand *by it* upon the city of Kansas City to either enact an ordinance for the change of the grade of the streets referred to in its answer, or for permission to elevate its tracks by the construction of an embankment, trestle or viaduct along or over said streets. The allegation, that the city "has not raised the grades of any of its said streets upon which said approaches rest and has refused to make such changes in the grades of said streets as will necessarily be required in the operation of trains by

the defendant *if* the height or elevation of its said railway bridge is increased in accord with the demand of the plaintiff herein; and in fact said city has failed and refused and still does refuse to make any change whatever in the grades of its said street," does not amount to an allegation *that the Railway Company has demanded* and been refused permission to reconstruct the approaches to its bridge.

> "The respondent in his return or answer must state the facts relied upon by him with certainty. Nothing is to be left to inference." 13 Enc. of P. & P. 716.

In High's Extraordinary Legal Remedies, Sec. 472, it is said:

> "No principle of the law of mandamus is better settled than that an argumentative return be like any other argumentative pleading is bad. The facts relied upon should be set forth clearly and positively *and not by way of argument or inference.* In other words, facts should be stated and not mere conclusions or inferences from facts, since a defective or incomplete statement of facts will not be aided or supplied either by intendment or inference. *Nor will the necessary facts which are not stated be inferred or intended from the facts actually set forth.* And a return is faulty which states mere conclusions of law without stating the facts so that the court may judge of their sufficiency."

The Railway Company does not appear from the record to have any franchise or rights to use any of the public streets of Kansas City.

The laws of Kansas require a railway company to procure the consent of the city to the construction or maintenance of railway tracks on public streets. The defendant company does not allege that it has any franchise or license at this time

to occupy any public street of the city of Kansas City, Kansas. The record does not show, but it may be true, that the franchise or license of the company to occupy the public streets of Kansas City, Kansas, has expired.

The harbor line map (of which the District claims this Court may take judicial notice) shows that it is several hundred feet from the river to the nearest street from the bridge in controversy. Before the plaintiff can complain with reference to inaction on the part of either the District or the city with reference to the changing of grade it ought to allege *that it has some rights with reference to the occupation or use of the public streets for its railway tracks*, and in the absence of such allegation, this Court does not warrant it in assuming that the Railway Company has any right to use or occupy any public street of the city of Kansas City, Kansas, particularly in view of the fact that the defendant company in its answer alleges that the "streets are not under the control of this defendant, but under the exclusive control of the city of Kansas City, Kansas." *The answer is in its effect an admission that the defendant has no rights on the public streets of Kansas City.*

In this connection, the Court's attention is called to the seventh subdivision of Section 3006, Gen. Stats. 1909, which authorizes the Drainage District to change the grade or elevation of all public highways or railroads at points where its levees cross or intersect the same.

This Court will take judicial notice that under the provision of Chapter 172 of the Laws of Kansas, 1911, and the proclamation of the governor of Kansas, of date February 3, 1911, the state appropriated to the use of the Drainage District all the land between the harbor lines and a strip of land 40 feet wide landward therefrom, said 40-foot strip being appropriated as set forth in said proclamation for the construction and maintenance of levees.

The Railway Company does not allege willingness to raise its bridge.

The alleged refusal of the city to change the grades of the streets upon which the Company's approaches to its bridge are constructed, does not appear from the answer to have been given in reply to any demand from the Railway Company, and even if the Railway Company had made such a demand upon the city and the same had been refused, it would be wholly immaterial, *unless the Company alleged its willingness to elevate its bridge.* As a foundation for a defense alleged, it would be necessary for the Company to allege its willingness to raise the bridge as required by the order of the District.

The defense that the city will not consent to a change of the grades of the streets is inconsistent with the position assumed by the Railway Company in its answer. As the Supreme Court of Kansas properly observed, if the Company was seeking to raise its bridge, it would doubtless without difficulty obtain consent to make any necessary or proper alterations in its approaches from the city or the Drainage District, or both.

In conclusion on this point, it cannot be inferred from the answer that the Railway Company is willing to raise its approaches or has requested permission from either the Drainage District or the city so to do, and it must be assumed that the officers of the Drainage District and the city, will or have consented to such alterations in the approaches of the Company to its bridge, as are necessary to enable it to continue the use thereof, especially if it has any rights on the streets.

The allegation that the District (paragraph 19 of answer) has no power or authority to order the raising of the bridge or the clearing of the channel is not a statement of any facts constituting a defense, but is a conclusion of law and an erroneous one as well.

As is said by the Supreme Court of California in *Ohm* v. *San Francisco*, 92 Cal. 437:

> "A conclusion of law in a pleading, so far as it is correct, is useless, and when erroneous it is worse than useless, and in either case it will be treated as if not alleged, in considering objections to the pleadings raised by demurrer."

The statutes of Kansas invest the District with plenary power to represent the state of Kansas as to the river and defendant's bridge.

The 4th, 5th and 9th sub-divisions of Sec. 3006, Gen. Stat. 1909 of Kansas are as follows:

> "*Fourth.* To take charge of and exercise exclusive control over all natural water courses within its territorial limits and to so widen, deepen, establish, regulate and maintain the channels thereof, and to construct and maintain such levees along the banks thereof as may be deemed necessary or proper to prevent or restrain overflow or lessen the volume thereof or the injury deemed likely to result therefrom; * * * *and may condemn and cause obstructions in such water courses to be removed.* * * *
>
> *Fifth.* To prescribe, regulate and fix the height of the superstructures above the water, the length of all spans and the location of the piers of all bridges across water courses situated in the district.
>
> *Ninth.* To maintain in any court of competent jurisdiction suits to enforce the reasonable orders of its directors to enjoin the placing *or maintenance* in any natural water course of any *unauthorized bridge*, embankment, pier or other work or structure constituting to any extent whatever an obstruction to the flow of the water. To restrain all other wrongful or unauthorized encroachments upon or interference with the channel of such water course, and to have all obstructions wrongfully placed in the channel of natural water courses adjudged public nuisances and abated as such. * * *"

The submission by the Railway Company of plans to the War Department for the rebuilding of its bridge for approval is not a defense to this suit.

The Railway Company does not allege that it has submitted to the Chief of Engineers or Secretary of War of the United States any plan or request for permission to elevate or raise its bridge *in accordance with the notice of the Drainage District involved in this suit.* Sec. 9 of the Act of Congress of March 3, 1899, 30 Stat. at Large, p. 1151, 6 Fed. Stat. Annot. 805, is as follows:

> "That it shall not be lawful to construct or commence the construction of any bridge, dam, dike or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War; *Provided*, that such structures may be built under the authority of the legislature of a state across rivers and other waterways the navigable portions of which lie wholly within the limits of a single state, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced; *And provided further, that when plans for any bridge or other structure have been approved* by the Chief of Engineers and of the Secretary of War, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War."

The Railway Company does not allege that plans for the construction of its bridge were ever submitted to the Chief of Engineers or Secretary of War. *Such an allegation was*

necessary in order to show that its bridge is a lawful structure. Such an allegation is necessary in order to make the proviso of said act prohibiting deviation from bridge plans approved by the War Department, applicable to this case. The language of the statute is that "when plans for any bridge or other structure have been approved by the Chief of Engineers and Secretary of War, it shall not be lawful to deviate from such plans either before or after the completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and Secretary of War."

By the 9th subdivision of Sec. 3006, Gen. Stat. of Kansas 1909, above quoted, the Drainage District is empowered to enjoin the maintenance of "unauthorized bridges" "and to have all obstructions wrongfully placed in the channel of natural water courses adjudged public nuisances and abated as such."

Before the Company can rely on this statute, it must bring itself within its terms and must also allege that it has asked the consent of the Chief of Engineers and Secretary of War to make the change in its bridge required by the Drainage District. The purpose of the statute above quoted is to prevent obstructions to the free navigation of water ways. The judgment of the Supreme Court of Kansas is for the removal of all obstructions to an elevation of 340.26 feet. This judgment promotes the objects of the statute and is in entire harmony with it. There is nothing in this Federal statute which makes it unlawful for the Railway Company to perform the judgment of the Supreme Court of Kansas in this case.

The Supreme Court of Kansas in its decision held:

> "The plaintiff board cannot compel the elevation of bridges in question until reasonable plans therefor are approved by the proper federal authorities."

This paragraph of the court's decision is not to be construed as constituting a defense to the right of the District to compel the elevation of the Railway Company's bridge. It simply recognizes the concurrent jurisdiction of the United States and the state of Kansas over the river. When a writ is issued upon the judgment, proper provision can be made therein exempting the Railway Company from performance thereof, if the Railway Company cannot secure the consent of the War Department to the elevation of its bridge 340.26 feet. A similar question arose in case of *People* v. *Board of Sup'rs*, 142 N. Y. 217, 36 N. E. 1062, an action of mandamus to compel the rebuilding of a bridge over a navigable stream; that court decided:

> "It is no reason for refusing mandamus to the board to build a bridge that before construction can be begun, the location and plans therefor would be approved by the Secretary of War."

In that case it was said the objection that under Sec. 7 of Chapter 1907, the Act of Congress passed Sept. 19, 1890, the Board of Sup'rs cannot proceed to construction of the bridge until the location and plans shall have been approved by the Secretary of War, may excuse them in a proceeding for contempt, *in case it appears that such consent has been sought in good faith and cannot be procured. We think the existence of this statute does not justify inaction and the matter can be provided for in the peremptory writ.*

The allegation that the order or demand of the District for the elevation of the bridge to 340.26 feet and the clearing of the channel is "unreasonable, illegal and arbitrary" does not put in issue the reasonableness of the order.

The pleadings presented no issue as to the necessity for or the reasonableness of the District's demand that the bridge be raised and the old bridge, its superstructure, piers, piling and wreckage removed from the channel.

The law of Kansas required the Railway Company to state the facts constituting its defense. If the Company desire to raise an issue of fact as to whether the elevation of its bridge six and one-half feet was necessary to protect the Drainage District against overflows, it should have alleged that a channel of less capacity that required, stating the facts of its contention. The conclusion of the Company that the District's demand is "unreasonable, illegal and arbitrary and beyond the power of said plaintiff to make," must be assumed to be because of the things theretofore alleged in its answer. The words "unreasonable," "illegal" and "arbitrary" as used in the answer do not constitute a statement of any fact or new matter of defense. They merely state a conclusion or opinion of the pleader. They do not amount to an allegation of mistake, fraud or misconduct on the part of the District's Board of Directors.

Justice Valentine, delivering the opinion of the Supreme Court of Kansas in *Stratton* v. *McCandless*, 37 Kan. 296, p. 305, said:

> "General allegations, such as are generally denominated conclusions of fact, conclusions of law or inferences, should not be considered as of any value, except in connection with the detailed statement of the facts."

See also *Byington* v. *Com'rs*, 37 Kan. 654.

In Merrill on Mandamus, Sec. 280, p. 345, it is said:

> "Though the mandatory part of the writ may be very general, yet the return must be very minute in showing why the respondent has not obeyed the order, and it

should contain positive allegations of fact and not mere inferences from facts."

At Section 274, Merrill on Mandamus, it is stated:

"The respondent is called upon to answer to the writ, and he must confine his traverses to the statements therein contained. *He cannot answer the writ by his legal inferences from facts not stated. The court has a right to know what the facts are, that it may judge whether the legal inferences are well drawn.*"

If the Company had alleged the capacity of the channel at its bridge as now constructed and facts showing such channel to be adequate to prevent overflows, the question would then arise as to whether or not evidence in support of such allegations (in view of the District's express legislative power to determine the elevation of bridges) was admissible. As the answer stands no such question is presented. The Supreme Court of Kansas was right in assuming that there was no issue of fact as to the reasonableness of the demand of the District for the elevation of the bridge six and one-half feet.

Neither the order of the District nor the judgment of the Supreme Court of Kansas deprives the Company of its property without due process of law, nor deny to it the equal protection of the laws, nor constitute a taking of its property for public use.

DECISIONS APPPLICABLE TO THIS CASE.

Railway companies are required by the statute and common law of Kansas as well to construct and maintain bridges so as not to impair the usefulness of navigable rivers.

Sec. 1763, Gen. Stat. 1909, relating to railroads in the state of Kansas, provides:

> "To construct its road *across*, along or upon *any stream of water, watercourse*, street, highway, plank road, or turnpike, which the route of its road shall intersect or touch; *but the company shall restore the stream, watercourse, street, highway, plank road or turnpike thus intersected or touched, to its former state, or to such state as to have not necessarily impaired its usefulness.* Nothing herein contained shall be construed to authorize the construction of any railway, not already located in, *upon or across any street in any city incorporate, or town, without the assent of the corporate authorities of such city.*"

In *Union Trust Co.* v. *Cuppy*, 26 Kan. 754, the Supreme Court of Kansas, construing the statute relating to the construction of railroads over streets and watercourses, held:

> "That a railroad company in constructing its road over a natural watercourse is required to leave such openings as are sufficient to afford an outlet for all water (from whatever source it may come, and in times of floods and freshets, as well as at other times), which may reasonably be expected to flow through such watercourse."

The Supreme Court of Kansas has followed the decisions of this Court. In its opinion (87 Kan. 272) (pages 17 to 25 of Record) it says:

"There remain questions concerning the power or propriety of granting the writs prayed for in view of the conditions set forth by the defendant as to the raising of grade to provide proper approaches for the bridges when so raised. We are met squarely by the question whether we can or should compel the defendants to put their bridges up to an altitude, which, without the raising of approaches, would render them absolutely useless and destroy the business and interstate possibilities of the defendant companies and whether they should be required to do this upon the theory that it rests upon them to find some way to compel or induce the city and the owners of intersecting railway tracks to permit such raising of the bridges and take care of the consequent alleged damages to abutting property.

It is insisted that the only proper method of requirement, if any, would be a proceeding in equity to which the city and others interested should be made parties, and that mandamus is not available, and *State* v. *Missouri Pacific Railway Company*, 33 Kan. 176, *Burlington, etc., Railroad Company* v. *People*, 77 Pac. 1026, are cited to sustain this contention. The first decision was upon the grounds, mainly, that the ordinance requiring the viaduct was vague and indefinite and that its enforcement would contravene certain provisions of the statute. In the Burlington case the ordinance was specific but it was deemed that a bill in equity rather than an action in mandamus was proper, for the reason that the viaducts sought to be required were such that no one of the companies involved could, independently of the others, build the portion required of it. It was a case in which it was attempted to require various defendants by one order to do what would amount to works of duplication, and one in which co-operation could not be compelled. Here the two defendants only are proceeded against, each

separately, and as between the plaintiff and either of them there is no physical obstacle to performing the thing required. That its performance may entail loss or expense on the defendants is a misfortune which, under the authorities, is no sufficient reason for refusing the writs. In cases where public disaster is sought to be averted the exercise of the police power is often burdensome indeed to the parties moved against, and a case might be imagined in which the actual destruction of valuable property would be required. As said in *Balch* v. *Glenn*, 85 Kan. 735 (p. 740):

'Property taken or destroyed for the purpose of abating a nuisance or to prevent the spreading of a pestilence is not taken for public use. All private property is held subject to such reasonable restraints and burdens as in the opinion of the legislature will secure and maintain the general welfare and prosperity of the state.'

Cases sometimes arise where the exigencies of the situation require private property to be destroyed immediately in order to prevent the spread of pestilence or some other calamity, and where, under all the circumstances, the loss which the individual suffers is so inconsiderable in comparison with the benefits to the public that in the opinion of the legislature he is regarded as fully compensated by his individual share in the benefits accruing to the public' (p. 743). But in this case the parties are corporations formed for a *quasi* public purpose and when granted rights to build their tracks across streams they take such rights subject to the liability to make such changes as the public welfare may require, especially so in cases where the occurrence or spread of great public disaster is sought to be averted.

All property, whether owned by private persons or by corporations, is held subject to the power of the state to regulate its use in such manner as not to unnecessarily endanger the lives and the personal safety of the people. The requirements that compensation be made for private property taken for public use imposes no restriction upon

the inherent power of the state by reasonable regulations to protect the lives and secure the safety of the people.

'The expenses that will be incurred by the Railroad Company in erecting gates, planking the crossing and maintaining flagmen * * * necessarily result from the maintenance of a public highway, under legislative sanction, and must be deemed to have been taken by the Company into account when it accepted the privileges and franchises granted by the state. Such expenses must be regarded as incidental to the exercise of the police powers of the state, and must be borne by the Company.' (*Chicago, Burlington, etc., Railroad* v. *Chicago*, 166 U. S. 226.)

Uncompensated obedience to a regulation enacted for public safety under the police power of the state is not taking property without due compensation. * * *

'It is the duty of the Railway Company, at its own expense, to remove the present bridge, and also (unless it abandons or surrenders its right to cross the creek at or in that vicinity) to erect at its own expense and maintain a new bridge in conformity with the regulations established by the Drainage Commissioners under the authority of the state; and such a requirement, if enforced, will not amount to a taking of private property for public use within the meaning of the constitution, nor to a denial of the equal protection of the laws.' (*C. B. & Q. Railway* v. *Drainage Comm'rs*, 200 U. S. 561.)

In the case just cited the court quoted with approval an expression of the Supreme Court of Illinois that the implied authority of the Company to build its present bridge was coupled with the common law duty 'to build its bridge over the natural watercourse, with a view of the future as well as the present contingencies and requirements of such watercourse, and with the further implied provision that there remained in the state, whenever the public welfare required it, the right to regulate its use' (p. 587).

In *Northern Pacific Railway* v. *Duluth*, 208 U. S. 583, it was held that an ordinance of a municipality compelling a railroad company to repair a viaduct constructed after

the opening of the road, by the city in pursuance of a contract relieving the railroad from making any repairs thereon for a term of years, was not void under the contract or due process clause of the constitution, and that such repairs could be required by mandamus. The court said (p. 595):

'We cannot resist the conclusion that, so far as concerns the matter now under consideration, the charter of the relator was taken subject to the right of the state to impose this duty whenever, by reason of the establishing of new highways, it should become necessary; and hence the relator is not entitled to compensation for obedience to this requirement.'

'But the exercise of the police power cannot be limited by contract for reasons of public policy, nor can it be destroyed by compromise, and it is immaterial upon what consideration the contracts rest, as it is beyond the authority of the state or the municipality to abrogate this power so necessary to the public safety' (p. 589). The Eighth Circuit Court of Appeals in *Chicago B. & Q. R. Co.* v. *Board of Sup'rs*, 182 F. 291, held that:

'A railroad corporation takes its franchise authorizing it to construct and maintain its road subject to the duty of making such modifications in its roadbed, whether the same consists of trestle or grade, as may be necessary to carry the same across such public improvements as highways and public drains thereafter established.'

Without multiplying citations it suffices to say that the mere matter of expense is no defense. As to the suggestion that the issuance of the writs would force the defendants into controversies with the city and with other railroad companies, it may be observed *that were the defendants seeking the privilege of raising their bridges they would doubtless find a way to secure the assent of the other interested parties*, and it must be left to them to take care of whatever contingencies may arise by obedience to the requirements of the writs. Such other interested parties cannot well put themselves in the attitude of the unreasonable hostility to the orders of this court or to the welfare of the people comprising the

Drainage District, and it cannot be presumed they will do so.

While plaintiffs pray for orders directing the defendants to raise their bridges to the points designated in the alternative writs and remove the old bridge, superstructure, abutments, piers, piling and wreckage, the real object is to clear the channel up to the height mentioned from obstructions—the subsequent elevation or rebuilding of the bridges in question being matters in which the defendants, rather than the plaintiff, are vitally interested.

While it is to be presumed that the bridges will, in fact, be elevated or rebuilt, *it is not deemed necessary that we make an order to that effect, but the writs will be allowed in both cases requiring the defendants forthwith to remove from the channel of the Kansas river all obstructions of every kind where their lines cross such stream,* the Kansas City Terminal Railway Company to clear such channel to a height of 342.73 feet above the St. Louis Directrix, and the Kansas City Southern Railway Company to clear such channel to a height of 340.26 above the St. Louis Directrix."

In *C. B. & Q. Rly. Co.* v. *Illinois*, 200 U. S. 561, it was decided:

"The police power of a state embraces regulations designed to promote the public convenience or the general prosperity as well as those designed to promote the public health, the public morals, or the public safety.

The imposition upon a railway company of the entire cost of removing and rebuilding a railway bridge and culvert made necessary by the proposed widening and deepening of the channel of a creek by drainage commissioners acting under the authority of the Illinois Farm Drainage Act of July 1, 1885, *does not amount to a taking* of private property for public use, which requires compensation in order to afford the due process of law guaranteed by the Federal Constitution.

The equal protection of the laws guaranteed by the Federal Constitution is not denied to a railway company by requiring it to stand the entire expense of removing and rebuilding its bridge and culvert, made necessary by the proposed widening and deepening of the channel of a creek by drainage commissioners acting under the authority of the Illinois Farm Drainage Act of July 1, 1885, to effect the drainage of low lands."

The court in its opinion said:

"The relief asked was a writ of mandamus commanding the railway company to forthwith enlarge, deepen, and widen the waterway over and across the company's right-of-way across Rob Roy creek.

The contention of the railway company is that, as its present bridge was lawfully constructed, under its general corporate power to build, construct, operate and maintain a railroad in the county and township aforesaid, and as the depth and width of the channel under it were sufficient, at the time, to carry off the water of the creek as it then flowed, and now flows—the foundation of the bridge cannot be removed and its use of the bridge disturbed unless compensation be first made or secured to it in such amount as will be sufficient to meet the expense of removing the timbers and stones from the creek and of constructing a new bridge of such length and with such opening under it as the plan of the commissioners requires. The company insists that to require it to meet these expenses out of its own funds will be, within the meaning of the Constitution, a *taking* of its property for public use without compensation, and, therefore, without due process of law, as well as a denial to it of the equal protection of the laws.

Whatever conflict there is arises upon the question whether there has been or will be in the particular case, within the true meaning of the Constitution, a 'taking' of private property for public use. *If the injury complained of is only incidental to the legitimate exercise of*

governmental powers for the public good, then there is no taking of property for the public use, and a right to compensation on account of such injury does not attach under the Constitution. Such is the present case. There are, unquestionably, limitations upon the exercise of the police power which cannot, under any circumstances, be ignored. But the clause prohibiting the taking of private property without compensation 'is not intended as a limitation of the exercise of those police powers which are necessary to the tranquility of every well-ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments. It has always been held that the legislature may make police regulations, *although they may interfere with the full enjoyment of private property, and though no compensation is given.*' Sedgw. Stat. & Const. Law 434.

Without further discussion, we hold it to be the duty of the railway company, at its own expense, to remove from the creek the present bridge, culvert, timbers and stones placed there by it, and also (unless it abandons or surrenders its right to cross the creek at or in the vicinity of the present crossing) to erect at its own expense and maintain a new bridge for crossing that will conform to the regulations established by the drainage commissioners, under the authority of the state; and such a requirement if enforced will not amount to a taking of private property for public use within the meaning of the Constitution, nor to a denial of the equal protection of the laws."

In *C. B. & Q. Rld. Co.* v. *Board of Sup'rs*, 182 Fed. 291, the Circuit Court of Appeals for the Eighth Circuit decided:

"A railroad corporation takes its franchise authorizing it to construct and maintain its road subject to the duty of making such modifications in its roadbed, whether the same consists of trestle or grade, as may be necessary to carry the same across such public improvements as highways and public drains thereafter established."

At pages 294-295 of the opinion, the court says:

"The duty of the railroad to conform its roadbed to the requirement of such public easements as highways and ditches is an incident of its right to construct and maintain its road. The whole subject has been clearly defined in the long line of cases in which railroads have been charged with the expense not only of building fences along their right-of-way, and cattle guards, but also with the expense of constructing crossings over new highways, both public and private, and also with the expense of constructing bridges and viaducts so as to obviate crossings at grade whenever the public welfare required such a change. It has been uniformly contended by the railroads that such expenses constituted a taking of their property for public use without just compensation, a deprivation of their property without due process of law, and a denial to them of the equal protection of the law. While there has been some conflict in the decisions, the overwhelming weight of authority at the present time is that such requirements are just, and are not subject to either of the constitutional objections mentioned."

At pages 297-298, the court further said:

"These crossing cases come much nearer to violating the constitutional rights of railroads than does the uncompensated intersection of a public drain. They compel the railroad not only to maintain its road over the highway, but also to construct, often at great expense, a safe passageway for the sole use of the traveling public. * * *

To hold that the public must bear the expense of constructing the bridges in question is not to compel them to pay for something which they have taken in constructing the ditch, but is to impose upon them the burden of constructing and maintaining the plaintiff's roads at the point of intersection. A more reasonable view is that declared by the courts, whose decisions we have quoted, that a railroad corporation takes its franchise authorizing it to con-

struct and maintain its road, subject to the duty of making such modifications in its roadbed, whether the same consists of trestle or grade, as may be necessary to carry the same across such public improvements as highways and public drains. To require this does not deprive the company of its property without due process of law, or deny it the equal protection of the law, but simply charges it with the obligation of maintaining its own road.

The claim of the plaintiff in this case is peculiarly devoid of merit. It has maintained for years wooden trestles at the points where its lines are intersected by the drain. These structures are temporary and perishable. In their place it demands that permanent bridges, with spans and concrete abutments shall be built and maintained at public expense across the drain. That would not be compensation for injury to private property, but simple enrichment of the company out of the public treasury."

The argument of the court in the case above cited is applicable to the case at bar. The Railway Company's bridge lacks almost 200 feet of spanning the river. Its bridge is wholly within the channel. It seeks to compel the public to pay for removing a nuisance; to compel the public to build for it a new bridge and approaches thereto. The Drainage District simply asks that the Railway Company maintain its bridge at a reasonably safe elevation.

In *St. Louis S. W. Ry. Co.* v. *Miller Levee Dist. No. 2*, 197 Fed. 815, paragraphs 2 and 3 of the syllabus are as follows:

"A levee district having been expressly authorized by Act, Ark., March 3, 1911 (Sp. & Priv. Laws 1911, p. 89), to construct certain levees along the banks of Red river, in M. county, the fact that, on account of the construction of such levees, *the plaintiff railroad company, which had previously, at great expense, built a bridge across the river, may be compelled to change the same, at its own expense, in order to raise it above the new high-water*

mark resulting from the confinement of the waters by the levees, does not constitute a taking, appropriating, or damaging of the railroad company's property without compensation in violation of the Constitution of the United States or of the state of Arkansas.

The construction of a levee across a railroad's right-of-way under statutory authority, which could be constructed without interfering with the movements of complainant's trains, does not constitute an illegal interferance with complainant as an interstate carrier of freight, passengers, and mail."

The decision above cited was in a suit in equity by the railway company to restrain the levee district from constructing a levee above a certain height and across its right-of-way.

"The bill alleges in substance that the construction of a levee will compel the railway company to raise and reconstruct its bridge across Red river, and the approaches leading to the bridge, at an expense of $150,000, and that additional openings in its embankment will be rendered necessary, which will cost $100,000. The bill further alleges that the district, on account of the limitations on its taxing power, will not be able to pay the railway company the amount it will cost to make such changes.

The effect of the contention of the railway company is that having legally constructed its bridge and approaches under conditions then existing, at a height and in a manner warranted by the best engineering skill and foresight, it cannot now, by a change of conditions authorized and directed by the state, be put to the expense of raising and reconstructing its bridge and approaches. In other words, it having some years ago at great expense adjusted itself to conditions as they then existed, those conditions must remain unchanged unless it is compensated for the expense which a contemplated change will necessitate. As additional grounds for an injunction, the railway company alleges that it is an interstate carrier of freight, passengers, and the United States mail, and that,

as a result of the construction of the levee, its bridge will be rendered insecure and liable to be destroyed, thereby endangering the lives of its employes and passengers, and interfering with and retarding the carriage of the mail."

At page 823 the court, referring to the contention that the construction of the levee would constitute an illegal interference with interstate commerce, said:

"The injury to the railway company by the construction of the levee is not a taking of property in violation of the Constitution of the United States; nor is it a taking, appropriating, or damaging of property in violation of the Constitution of the state of Arkansas. Nor is the construction of the levee across the right-of-way of the railway company an illegal interference with it as an interstate carrier of freight, passengers, and the United States mail. The levee can be constructed across the right-of-way without interfering with the movement of trains. *The presumption is that it will be so constructed. It is within the power of the state to authorize the condemnation of a railway right-of-way for such a purpose. St. Louis & S. F. R. Co.* v. *Fayetteville*, 75 Ark. 534, 87 S. W. 1174."

In *C. B. & Q. R. Co.* v. *Board of Sup'rs*, 170 Fed. 665, the court in the second and third paragraphs of the syllabus decides:

"In Iowa Statute of 1904 (Acts 30th Gen. Assem. 1904, p. 61 c. 68), which authorizes county boards of supervisors to create drainage districts and to drain lands and change natural water courses to promote the public health, convenience and general welfare, and which, as amended in 1907 (Acts 32d Gen. Assem. 1907, p. 100 c. 95) provides that any railroad company whose right-of-way shall be crossed by any drainage ditch or channel *shall not be allowed damages on account of bridging the same, is not*

unconstitutional as taking the property of the railroad company without compensation, the state having the right in the exercise of its police powers, for the purposes expressed in such act, to impose expense or burdens on property without the allowance of an equivalent by way of damages.

Under the Iowa Drainage Law (Acts 30th Gen. Assem. 1904, p. 61 c. 68), which authorized the supervisors of a county to create drainage districts, to construct ditches or change water courses and to appoint commissioners to classify lands within such districts and assess the benefits, the findings of fact of such tribunals are conclusive, and their action can be reviewed by the courts only as to questions of law, and upon the question of the amount of benefits assessed, which by the express terms of the statute is reviewable on appeal."

In the opinion in that case at page 669, Judge McPherson, citing and quoting from the decisions of this Court in *C. B. & Q. Rld. Co.* v. *Ill.*, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. Ed. 596, and *C. B. & Q. Rd. Co.* v. *Chicago*, 166 U. S. 226, says:

"Whatever promotes the health, the safety, the convenience, and the welfare, limited to certain lines, is an exercise of the police power, for which property without compensation can be taken, and expense and burdens can be imposed without an allowance of the equivalent by way of damages. * * *

When a tribunal is empowered or directed to pass upon questions of fact, such findings are final and conclusive as to the facts, but not to matters of law. Therefore the findings of the engineer and board as to the necessities of a new channel, to the end that the public health, convenience, and welfare would be promoted, and as to the location and benefits, and depth and breadth of the new channel, are all findings of fact concerning which the courts can make no inquiry, much less review or set aside. *Ryan* v. *Varga*, 37 Iowa 78; *Slack* v. *Blackburn*, 64 Iowa 373,

20 N. W. 478; *Martin* v. *Mott*, 12 Wheat. 19, 6 L. Ed. 537; *Commissioners* v. *Aspinwall*, 21 How. 539, 16 L. Ed. 208; *Enterprise* v. *Zumstein*, 67 Fed. 1000, 15 C. C. A. 153; cases cited in *People's Bank* v. *Gilson*, (C. C.) 140 Fed. 1."

In *State* v. *M. & St. L. Ry. Co.*, 39 N. W. 153, the court decided:

"Mandamus proceedings against the Minneapolis & St. Louis Railway Company to compel it to bridge its tracks where they cross city streets, and to construct approaches to such bridges at one end of the same. The Manitoba Railway tracks cross the same streets so near to those of the other company as to suggest the necessity, if either system of tracks should be bridged, that the bridges be made continuous over all the tracks of both companies. A like mandamus proceeding was pending against the Manitoba Company to compel it to construct those parts of the bridges over its tracks with approaches thereto. Both causes were required to be tried together. Held not to be error.

Charter of the Minnesota Western Railway Company (Sp. Laws 1853, c. 66) construed as imposing a continuous duty as to restoring public streets to usefulness, by bridging or otherwise, when necessary.

The fact that a railroad has once been lawfully constructed upon the grade of a street does not exempt it from bridging when that becomes necessary.

Mandamus proceedings may be prosecuted to determine the mode in which the respondent shall be required to restore a street, and to compel it to perform its duty, although the city council has not yet changed the established grade of the street to conform to the level which the relator claims should be adopted."

In the opinion at page 157-158, the court says:

"The fact that the respondent formerly laid its tracks, at a considerable expense, upon the grade of the streets, by the authority of the city council, does not exempt it

from the duty of bridging when the increased use of both the railway and of the streets render that necessary. *State* v. *Railway Co.*, 35 Minn. 131, 28 N. W. Rep. 3. *From the fact that the city has not yet changed the grade of these streets so as to conform to the plan of the proposed bridges it does not follow that this compulsory proceeding may not be maintained.* The city authorities had no power to compel these corporations to adopt a plan which they might deem best; and since, as has been decided, it could only be finally determined by judicial decision what the corporations should be compelled to do, it is obvious that any fixing of grade for these bridges, by the action of the city council prior to the decision of the controversy as to whether the corporations were under obligation to bridge the streets, and if so, how it should be done, would have been speculative, and subject to such changes as might become necessary as the result of the decision of the court. The authority of the court to determine the necessity, and the mode of carrying these streets over the tracks, necessarily involves the power to determine the elevation or grade of the bridges; and to this extent the power given by the city charter to the city council to establish and change the grades of streets must be regarded as qualified."

In *City of Emporia* v. *Rly. Co.*, 88 Kan. 611, it appeared that the city of Emporia sought by mandamus to compel the railway company to remove an embankment and carry its tracks upon a viaduct over a public street. The defendant claimed the ordinance was unreasonable, unjust and confiscatory; that it would involve an expenditure of $10,000 by it, without benefit to the city therefrom. *It was also claimed that the city had made no provision for the removal of a sewer which formed an obstacle to the construction of the subway,* and in conclusion it was claimed that by the ordinance, the defendant was deprived of its property without due process of

law, and denied the equal protection of the laws, contrary to the Constitution of the United States and amendments thereto.

In that case, as in this, the answer contained a general denial and alleged matters above mentioned, which it was claimed, rendered the ordinance void. *The plaintiff moved for judgment on the pleadings, and was awarded a peremptory writ of mandamus as in the case at bar.*

In the opinion at page 613, the court said:

> "The courts have no general supervisory power over the policy of municipal legislation. The extent to which the welfare of a city and of the traveling public will be promoted by opening a city street through a railway embankment which wrongfully obstructs it, leaving the railway tracks upon a viaduct, is not a judicial question. *The power of the city over the subject is legislative, and the courts can interfere in such cases only because of some constitutional impediment or lack of legislative authority on the part of the city, or because the conduct of the city is so arbitrary, capricious, unreasonable and subversive of private right as to indicate an abuse rather than a bona fide exercise of power.*"

IV.

The judgment is within the scope of the pleadings. The pleadings gave the Supreme Court of Kansas jurisdiction over the bridge and the river. The court had jurisdiction to order the raising of the bridge or its removal, or both.

The law gives the Supreme Court of Kansas original jurisdiction in mandamus. The motion and affidavit for the alternative writ, the alternative writ, and its service and the appearance of parties gave the court jurisdiction of this particular

case. The cause of this suit is the defendant's bridge; that bridge is the object or subject-matter of this suit. In both the motion and affidavit for, and the alternative writ, it is alleged:

> "That the defendant herein owns a bridge across the Kansas River within the Drainage District which is usually termed 'the Ohio bridge.' "
>
> "That heretofore and by virtue of the power in it vested, the plaintiff on or about the 15th of July, 1911, notified the defendant to raise its said bridge 6.5 feet or to the required height of 340.26 feet above St. Louis Directrix *and to remove the old bridge, superstructure, abutments, piers, piling and wreckage.* That the said defendant has failed, neglected and refused so to do."
>
> "Wherefore the plaintiff prays a writ of mandamus to the defendant requiring it to commence at once and proceed as rapidly as possible with the raising of its said bridge so that the lowest point of superstructure will be 340.26 feet above Saint Louis Directrix *and that it remove the old bridge, superstructure, abutments, piers, piling and wreckage;* that the raising of said bridge and the removing of said obstructions is absolutely necessary in order to prevent overflow of the Kansas River by reason of the fact that at the present elevation said bridge and said obstructions obstruct the flow of water and cause the same to overflow the banks of said stream and to flood the inhabitants contiguous thereto, and for such other and further relief as to the court may seem right and proper."

The allegations of the writ and the petition for it gave the trial court jurisdiction not only to consider the matter of raising the bridge, *but also invested the court with jurisdiction to order the removal of the "old bridge, superstructure, abutments, piers, piling and wreckage."* The prayer of the District was for a writ requiring the defendant to commence at once and proceed as rapidly as possible with the raising of its bridge

"and that it remove the old bridge, superstructure, abutments, piers, piling and wreckage."

> "Jurisdiction of the subject-matter is obtained by the filing of such a pleading or petition as will bring the action within the authority of the court.
>
> It is not necessary that the pleading shall state a cause of action, or be so drawn as to withstand a demurrer, but it must be sufficient to show that the subject-matter of the action is within the jurisdiction of the court." (See Works on Courts and Jurisdiction, Sec. 11, p. 30, and 1 Bailey on Jurisdiction, Sec. 7, p. 6.)

The matter decided, to-wit, that the defendants remove from the Kansas River *"all obstructions of every kind and character" where its bridge crosses the stream and commanding the company to "clear such channel to a height of 340.26 feet,"* etc., was within the issue; was submitted for decision by the pleadings. The allegations relative to the removal of the old bridge and its parts is just as prominent and positive as the allegation as to the defendant raising its bridge. The Company had the opportunity to contest and did contest in the trial court the matter of removal of the old bridge and its parts. The Company *has had an opportunity to be fully heard* and has been heard by a competent court, as to the right of the District to recover the judgment rendered. The court having by the pleadings jurisdiction to render the judgment complained of by the Company, it necessarily follows that the judgment is an adjudication of all matters necessary to be decided in order to render such a judgment. In other words, it must be held that the Supreme Court found that there was no defense stated in the answer and that the material allegations of the writ, including the allegation that the District demanded the removal of the "old bridge, its superstructure, abutments and piers," were expressly admitted by the answer or by its legal effect.

The trial court was not bound to order the bridge raised. It could order such judgment as the facts shown by the pleadings and the law applicable warranted.

In Kansas a plaintiff recovers such judgment as the cause of action established entitles him regardless of his prayer. In mandamus under the Kansas statute, a plaintiff on motion for judgment over the answer is entitled to peremptory writ. In Kansas a peremptory writ may be allowed in the first instance. *If so, it could certainly be allowed after a hearing on the motion and affidavit set forth in the record.*

Sections 6313, 6314, 6317 and 6318 of the Kansas Code of procedure are as follows:

> "Sec. 6313. When the right to require the performance of the act is clear, and it is apparent that no valid excuse can be given for not performing it, *a peremptory mandamus may be allowed in the first instance;* in all other cases the alternative writ must be first issued.
>
> Sec. 6314. The motion for the writ must be made upon affidavit, and the court may require a notice of the application to be given to the adverse party, or may grant an order to show cause why it should not be allowed, *or may grant the writ without notice.*"
>
> "Sec. 6317. If no answer be made, a peremptory mandamus must be allowed against the defendant; *if answer be made, containing new matter, the same shall not, in any respect, conclude the plaintiff, who may, on the trial or other proceeding, avail himself of any valid objections to its sufficiency,* or may countervail it by proof, either in direct denial or by way of avoidance.
>
> Sec. 6318. No other pleading or written allegation is allowed than the writ and answer. These are the pleadings in the case, and have the same effect, *and are to be construed, and may be amended, in the same manner as pleadings in a civil action;* and the issues thereby joined must be tried and the further proceedings thereon had in the same manner as in a civil action."

The Drainage District stated a cause of action for the raising of the bridge *and* the removal of the old abutments, piers and wreckage from the channel. The court granted only a part of the relief asked. It gave judgment for the removal of all "obstructions" to an elevation of 340.26 feet. This judgment does not prevent *but permits the raising or reconstruction of the bridge.* It does not command the defendant to raise the bridge to 340.26 feet. Only "obstructions" are required to be removed from the river.

Assuming that the Company cannot be compelled to reconstruct its bridge without its plans being first approved by the War Department, it does not follow that a peremptory writ cannot be issued compelling it to ask such assent or remove its bridge.

The case of *People* v. *Board of Sup'rs,* 142 N. Y. 217, 36 N. E. 1062, was an action of mandamus to compel the rebuilding of a bridge over a navigable stream. The court decides:

> "It is no reason for refusing mandamus to the boards to build the bridge that, before construction can be begun, the location and plans will have to be approved by the Secretary of War. (Act Cong., Sept. 19, 1890, c. 907, Sec. 7.)"
>
> * * * *
>
> "It is no reason for refusing the proper peremptory writ that the alternative writ asks too much, or not quite the right, relief."

In the opinion, at page 1064, the court says:

> "The alternative writ is now equivalent to the complaint in an action, and the demurrer and return stand as a demurrer or answer in an ordinary suit. If the substantial right is set out in the writ, the proceeding will not fail because the relator asks for too much, or mistakes to some extent the relief to which he is entitled. The

court, in awarding the peremptory writ, may mold it according to the just rights of all the parties. (Code Civ. Proc., Secs. 2067, 2090; *People* v. *Nostrand*, 46 N. Y. 375; *People* v. *Dutchess & C. R. Co.*, 58 N. Y. 152; *People* v. *Wilson*, 119 N. Y. 515, 23 N. E. 1064.)

The objection that under Section 7 of Chapter 907 of the Act of Congress passed September 19, 1890, the boards of supervisors cannot proceed to construct the bridge until the location and plans shall have been approved by the Secretary of War may excuse them in a proceeding for contempt *in case it appears* that such consent has been sought in good faith, and cannot be procured. We think the existence of this statute does not justify inaction, and the matter can be provided for in the peremptory writ, if one shall be issued."

"The prayer in the petition for a mandamus may properly be disregarded, and the final order made to conform to the facts alleged and established."

Osage Valley & S. K. R. Co. v. *Morgan County Court*, 53 Mo. 156.

"The final order in mandamus need not conform to the prayer of the petition, *nor to the mandatory clause in the alternative writ*, but may be framed according to the facts established. *School Dist. No. 1* v. *Board of Education of Town of Lamar*, 73 Mo. 627."

"Where plaintiff in mandamus demands greater relief than he is entitled to on the facts stated in his affidavit, he will not thereby be precluded from obtaining less relief, to which he is entitled under the facts stated. *Smith* v. *Lawrence*, 2 S. D. 185, 49 N. W. 7."

In *Howard* v. *Huron*, 6 S. D. 180, 60 N. W. 803, page 104, the court said:

"We fully agree with the reasoning of the learned Supreme Court of Ohio in *State* v. *Crites*, 48 Ohio St. 142,

26 N. E. 1052. In that case the court says: '(4) The earlier doctrine in mandamus was that the peremptory writ should strictly follow the alternative one. That rule, in all its strictness, is still followed in many of the more modern cases. * * * Valid reasons for this rigid rule are not at all apparent. The civil remedy by mandamus is to enforce civil rights, and why the proceeding therein should not be as elastic as in civil actions has not been satisfactorily answered by the cases that adhere to the rule. In civil actions no one would be heard to contend, at this late day, that, because the plaintiff had claimed more than upon the trial he could maintain, it would be fatal to his right to recover that to which he was entitled upon the facts and the law as they appeared upon the trial. In mandamus is it so much less difficult for a party to determine in advance the exact measure of his rights, that if he makes a mistake in that regard, by claiming more than he can maintain upon the trial, he is to be sent out of court, mulcted in costs, and compelled to begin *de novo?* If he claims less than his right, no more than is claimed will be awarded him. If the rule should be maintained in all its strictness, the remedy of mandamus will be a perilous one to invoke in cases where more than a single act or right is sought to be enforced. If less than his full right is claimed by a party, he will not recover that not claimed, but must encounter the delay of another proceeding, and the hazard of a plea of *res adjudicata* in respect of it, while if he claims too much he will be denied any relief whatever, however clearly his title may appear to a large part of his demand. In many cases courts have sought to escape from the extreme severity of the rule—in some instances by holding the difference between the two writs to consist of immaterial matters of detail, while in others an amendment of the alternative writ was allowed, making it conform to the peremptory writ. *State* v. *Acting Board of Aldermen*, 1 S. C. 31; *State* v. *Weld*, 39 Minn. 426, 40 N. W. 561; *State* v. *Baggott*, 96 Mo. 63, 8 S. W. 737; 2 Dill. Mun. Corp. (3d Ed.), Sec. 879. * * *

Treating the petition, and the alternative writ based upon it, as the foundation of the relator's claim, bearing

> the same relation to the proceedings in mandamus that the petition does to the proceedings in a civil action, and it is clear he is entitled to no relief beyond that which the petition and alternative writ show him entitled to, and if he wishes other relief he must, as in civil actions, set forth by an amendment the facts that establish his right to it; but where, upon the trial, he is able to establish by proof, or maintain in law his title to a part only of the relief sought, there seems now to be no reason for refusing to grant so much thereof as under the facts and law he is entitled to, without first amending the alternative writ."

In *State* v. *Weld*, 39 Minn. 426, 40 N. W. 561, in the opinion the court says:

> "The statute allows amendments of the writ and answer as in case of pleadings in civil actions, and provides that the issues are to be tried and further proceedings had in the same manner as in civil actions. The proceeding is therefore now so elastic that the peremptory writ need not precisely follow the alternative one, *but the court, upon the hearing, may grant the relief in any form consistent with the case made by the complaint, and embraced within the issues.* *State* v. *Railway Co.*, 39 N. W. Rep. 153; *People* v. *Railroad Co.*, 58 N. Y. 152."

In *Gunn* v. *Lauder*, 10 N. D. 389, 87 N. W. 999, the court, at p. 1005, says:

> "It is further true that the ancient and stricter rule in mandamus has been relaxed by modern adjudications, under which a final writ 'may be in any form consistent with the case made by the complaint presented, and embraced within the issues.'"

In *School District* v. *School District*, 78 Pac. 690, the Supreme Court of Colorado decided:

> "That mandamus commanding the school district to pay the amount of claims which had been subsequently ascertained, from the funds realized from the levy of 1903, should be denied, but the district should be compelled to certify a special levy to the city council to meet such claims, or to include such a levy in its certificate of the 1904 levy for ordinary purposes."

In the opinion the court, citing *Ralls Co.* v. *U. S.*, 105 U. S. 733, says:

> "It does not follow, however, that petitioners are not entitled to any relief under the facts of this case, although they are not entitled to that which was awarded. Under the ancient practice a peremptory writ of mandamus could not be amended, and must issue in the same form as the alternative writ. The provisions of our law in relation to mandamus in the *nisi prius* courts are found in a chapter of the Civil Code, and there is no reason why the liberal rules of procedure and amendments governing other civil actions instituted thereunder are not applicable to a proceeding in mandamus. In these two applications under consideration the proceeding was by petition supported by affidavit and written notice to the respondents, and no alternative writ was issued. Upon a hearing had under issues of fact, the peremptory writ was the first one issued. We do not consider it fatal to petitioners' application that alternative relief was asked for, although there are decisions to the effect that a writ cannot go in the alternative. In *State* v. *City of Milwaukee*, 22 Wis. 398, the doctrine was announced that the mandatory clause of the writ should expressly state the duty required of the defendant. There the command was that the defendant pay the judgment mentioned, *or issue bonds for its payment, or proceed and levy a tax therefor.* It was held that these acts are distinct in

their nature, and that defendant may not know which to perform. A motion to quash the writ was sustained, but leave was given to relator to amend the writ if it desired to do so, for it was held that the writ was amendable. *In Ralls County Court* v. *U. S., 105 U. S. 733, 26 L. Ed. 1220, where the command of the writ of mandamus was to pay from money already raised, or levy a tax to raise more, it was held that a writ thus issued in the alternative was proper.* However that may be, we are satisfied that, where no alternative writ issued, but the peremptory writ was the only one allowed, if the granted relief was not proper, still, if the petitioner or relator is entitled to some kind of relief which was included in his prayer, he should receive it, and the necessary amendments in pleadings and processes may be made to conform thereto. The modern authorities sustain this conclusion. Merrill on Mandamus, Sec. 294; *State* v. *Supervisors*, 20 Wis. 79, 84; *People ex rel.* v. *Supervisors*, 27 Cal. 655, 684; *People ex rel.* v. *Supervisors*, 142 N. Y. 271, 278, 36 N. E. 1062; *Odendahl* v. *Russell*, 86 Iowa 669, 53 N. W. 336; *Dew* v. *Judges of Sweet Springs*, 3 Am. Dec. 639; 13 Enc. Pl. & Pr. 751 *et seq.*"

In conclusion, the Drainage District submits that an examination of the record shows that the Railway Company in its brief and argument has overlooked or misapprehends the legal effect of the pleadings upon which the judgment complained of is based, and that the decision of the Supreme Court of Kansas appears from the record to be correct.

Wherefore, the defendant in error prays:

First. That this appeal be dismissed for want of jurisdiction.

Second. That if such relief be not granted, the judgment of the Supreme Court of Kansas be affirmed, and that the plaintiff in error have all other proper relief.

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